Central Law Journal.

ST. LOUIS, MO., SEPTEMBER, 2 1904.

HAS EQUITY THE RIGHT TO FIX THE RENTAL OF PROPERTY WHERE ARBITRATORS, APPOINTED BY THE PARTIES, FAIL TO AGREE?

Among the many intricate questions relating to the law of landlord and tenant which perplex the busy lawyer, the one stated as the subject of this editorial is not the least puzzling. A recent case, however, has thrown considerable light upon this question, and clearly stated the rule of law as it should be. Kaufmann v. Liggett, 58 Atl. Rep. 129. In this case the Supreme Court of Pennsylvania held that where a lease provided for a renewal of ten years, the rent to be fixed by arbitrators, and the arbitrators failed to agree, equity has power to fix the amount of the rent for the extended term.

The Pennsylvania court, after examining the authorities to determine the jurisdiction of equity in fixing the rental in a lease, said in part as follows: "After careful consideration of this question, in the light of the elaborate argument of counsel for the appellant, we agree with the conclusion of the court below that the fixing of the rental value of the premises for the period in dispute in this case is not of the essence of the contract, but that the right of renewal constituted the substantial element in this portion of the agreement. It was that feature which, in great measure, justified the lessees in erecting upon the premises a large and costly building, adapted to the needs of their business. As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power of stipulating in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself. Taylor's Landlord & Tenant (9th Ed.), § 81. Nearly all of the cases cited by the appellants to sustain their contention that the fixing of the rental value is of the essence of the contract were proceedings to enforce specific performance of contracts for the sale of land; and in this class of cases it has invariably been held that the price to be paid is an essential element of a contract of sale, and, unless the price has been fixed, the contract is not certain, and cannot be enforced. We are not, however, here dealing with a contract for the sale of land, but we are dealing with covenants for the renewal of a lease, and that, too, in a case where the lessees have been in possession of the premises under the lease for more than 18 years, and have made valuable and extensive improvements upon the property during that time, and have built up a large and extensive business thereupon. During all these years the lessors have been receiving a rental for the property which was entirely satisfactory. There is a marked distinction between the rule which may equitably be applied to a contract for the sale of land, and that which should govern in an agreement for the renewal of a lease, where possession has been enjoyed and improvements made during the first period under a reasonable expectation of benefits to be derived therefrom during future extensions of the lease at the option of the lessee."

Before passing to a consideration of the American cases on this subject, we call attention to the following English cases: Milnes v. Gery, 14 Ves. 400; Gregory v. Meghell, 18 Ves. Jr. 328; Gourlay v. Somerset, 19 Ves. 429; Dinham v. Bradford, L. R. 5 Chan. App. Cas. 519. Among the American authorities, we note first the case of Dunnell v. Ketetas, 16 Abb. Prac. 205, where the court says: "It is true, indeed, as a general rule, that a court of equity will not decree specific performance of a covenant or agreement to appoint arbitrators or appraisers. Where, upon a contract for the sale of property, the price is not fixed, but is left to be determined by certain persons named in the contract, the court will not force them to a decision, and will not undertake to perform the duty intrusted to them, so that, if they do not fix the price, the agreement must fail, unless under certain circumstances there has, notwithstanding the defect, been an acquiescence under it, or such a part performance that it would be inequitable not to enforce its execution. In such a case the court will not ascertain what is the fair value. Where, also, the agreement was to sell at a fair valuation, and no persons were appointed to make it, there being nothing to preclude the court's interference, a court of equity has taken it

upon itself to determine what is a proper price, and has decreed a specific performance accordingly. In fact, where any term of a contract in all other respects complete is left to the determination of others, and the same is not of the essence of it, the court will take it upon itself to decide that matter, and will thereupon decree a specific performance."

That the fixing of the rental of a lease is not of the essence of the contract as in a sale, seems to be the rule supported by the authorities. Taylor's Landlord and Tenant (9th Ed.), § 14; Mitchell v. Commonwealth, 37 Pa. 187; Grosvenor v. Flint, 20 R. I. 31, 37 Atl. Rep. 304; Techeider v. Biddle, 4 Dill. 58, Fed. Cas. No. 14,210; Coles v. Peck, 96 Ind. 333, 49 Am. Rep. 161.

After reviewing carefully all the authorities on the several phases of this question, the court in the principal case said: "After a careful consideration of all the cases bearing upon the subject which have been brought to our attention, or which we have found, we are satisfied that the authorities well agree that equity will not compel an arbitration, and this upon the very good ground that the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators, but that in cases of renewal leases the weight of authority clearly favors the view that the tenant in such a case has a *quasi*-proprietorship—a right, lacking merelya valuation—and that the grossest inequity would be worked, should he lose his right through a failure upon the part of the arbitrators to fix a valuation. While, therefore, a court of equity will not undertake to compel an arbitration, which it cannot control, it will in such case make an appraisement itself, or direct it to be done by its own officer, and will thereafter enforce specific performance of the contract upon the terms so found."

NOTES OF IMPORTANT DECISIONS.

BANK — LIABILITY OF BANK FOR RECEIVING STOLEN BONDS.—Does a bank, to which stolen coupon bonds payable to bearer, have been pledged as collateral security for a loan by the thief in the ordinary course of business without notice to the bank of any infirmity in the title, and without any circumstances to put the bank on inquiry, take a good title thereto as against him from whom they were stolen. Such was the question raised in the recent case of Cochran v. Fox Chase Bank, 58 Atl. Rep. 117, where the Supreme Court of Pennsylvania held that where one who had stolen coupon bonds payable to bearer pledged the same to a bank in the ordinary course of business without any circumstances placing the bank on inquiry, the bank took a good title thereto as against the true owner.

The court in explanation of its decision said: "The bonds were ordinary bonds, payable to bearer, with coupons attached. At a not very remote period in our judicial history such a bond would not have been considered negotiable, as a note or bill of exchange, and the holder would have taken it subject to the burden, if called upon, of proving his title to it, as against one claiming to be the real owner; but at least as early as 1824, in Gorgier v. Mieville, 3 B. & C. 45, such instruments were placed in England on the same plan as notes and bills of exchange, and were held negotiable. The distinction between such a negotiable instrument and ordinary goods and chattels, such as horses, pictures, and the like, is that it is valuable only as entitling the holder to receive at some future time a certain sum of money, which is precisely the value of a note or bill of exchange. It is of itself neither useful nor valuable, as other chattels, is but a representative of money, and therefore subject to the same rules which regulate the transfer of money. A learned and conclusive discussion of the whole subject of the negotiability of such instruments by Justice Read, of this court, is given in County of Beaver v. Armstrong, 44 Pa. 63. He gives the history of the decisions both in England and this country, and shows conclusively that by the settled law such bonds are negotiable, and that the title passes by delivery. There has not been the slightest departure since, at least in this state, from the law as announced in that case.

It is also settled that a *bona fide* holder of such an instrument, for value, before maturity, taken in the usual course of business, acquires a good title thereto, even as against him from whom it was stolen. 2 Cook on Corporations, p. 1731, says: "A *bona fide* purchaser of a bond which has been stolen takes a good title." He gives ample authority in his notes supporting this text. Mason v. Frick, 105 Pa. 162, 51 Am. Rep. 191, held to the same rule. In that case, like the one before us, the bond was that of a private corporation, payable to bearer. The plaintiff, Mason, kept it in his safe. The safe was broken open and the bond stolen. The thief transferred it to one Freeman, who knew when he took it that it had been stolen. Freeman pledged it as collateral security for a loan to Frick, the defendant, who took it in good faith. The rule that the *bona fide* holder of a stolen negotiable security is protected against a claim of the real owner was not even contested by the owner, but it was argued that the bond, being that of a private corporation, was not negotiable, and that the holder took it subject to the equitable rights of the real owner. It was held

by this court that the law governing the case was that announced in County of Beaver v. Armstrong, *supra*, and that the *bona fide* holder was protected against the claim of the real owner."

CORPORATIONS—CORPORATE LIABILITY FOR AGENTS' FRAUDULENT DEALING WITH STOCK.—Few branches of the law have produced a judicial conflict so remarkable for its persistence and vigor as that branch involving the liability of a principal for the fraud of his agent upon the ground of estoppel. In general two doctrines stand out in sharp contrast. In England the principal will not be bound unless the act be not only within the apparent authority, but also for the principal's benefit. Barwick v. English Joint Stock Bank (1867), L. R. 2 Ex. 259. Originating in New York, the sounder doctrine declares that if the act be within the apparent authority, the intention of the agent is immaterial. Bank v. Aymar (1842), 3 Hill, 262. Coming more particularly to the liability of a corporation for the fraudulent issuing of stock, the same difference occurs, the leading English cases denying corporate liability where the fraud is not for the principal's benefit (British Banking Co. v. Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714), the New York courts binding the corporation whenever the act of the agent is within the holding out. N. Y., N. H. & H. Ry. Co. v. Schuyler (1865), 34 N. Y. 30. A decision recently reached in England is not only in conflict with the former doctrine obtaining there, but in advance of any holding under the New York rule. The secretary of the defendant corporation requested the plaintiffs to arrange a loan for him upon 5,000 shares of the stock of the corporation which he claimed to own in part, and which was outstanding in his co-owner's name. The plaintiffs negotiated the loan and the secretary handed over the certificate, it purporting to have been executed by "E. Storey" as transferor. The certificate was in form regular, signed by two directors, as required in the by-laws, sealed and countersigned by the secretary. In fact, the names of the directors had been forged. It was held that the defendant is estopped to deny its liability. Ruben & Ladenburg v. Fingall Consolidated (K. B. 1904), 20 T. L. R. 241.

In order to classify this decision it becomes necessary to make a comparative analysis of the cases wherein the agents' fraudulent dealing with the stock has been involved. These may be considered in four groups: (1) Where the agent, purporting to act as agent, issues spurious stock. In this case, upon sound principle, the corporation should be liable, the agent being clothed with apparent authority to issue stock. N. Y., N. H. & H. Ry. Co. v. Schuyler, *supra*. (2) Where the by-laws require the signatures of other officers, and the agent purporting to act as agent forges the required signatures and issues the stock to a *bona fide* purchaser. It may be argued that the forgery should not change the case from the first class; that it was within the apparent authority to make the final declarations as to the validity of the stock, and to represent that all the prerequisites to its validity had been complied with. Fifth Ave. Bank v. Forty-Second St. R. R. Co. (1893), 137 N. Y. 231. On the other hand it may be said that the very reason for the requirement of countersigning, was to place it beyond the power of any one agent to bind the corporation by his fraud, and that it was not within the transfer agent's apparent authority to represent that the signatures on the certificate were valid. This would appear to be the sounder view. (3) Where the agent, still purporting to act as agent having forged the required signatures does not issue the certificate but assigns it as an outstanding certificate using a fictitious name or the name of some stockholder. Here although he purports to act as agent yet the act is outside his apparent authority which was to issue stock and not to assign and deliver outstanding stock and this distinguishes the case from those in the second class. Second National Bank v. Curtiss (1896), 2 App. D. 508. (4) Where the agent issues the forged stock as in the second class but under circumstances wherein it is known to the third party that he is acting in a personal transaction undertaken for his own benefit. Here the officer is not purporting to act as agent and this distinguishes the case from those in the second class although the act is the same. Manhattan Life Ins. Co. v. Forty-Second St. Ry. Co. (1893), 139 N. Y. 146. Summarizing, then, it appears that in the first class the officer purporting to act as agent does an act within his holding out; in the second he purports to act as agent *sed quære* as to whether the issuing of the forged certificate is within his holding out; in the third still purporting to act as agent he acts outside his apparent authority and in the fourth he does not act as agent even assuming that the act of issuing the forged certificate would be within his apparent authority. Recalling the facts of the principal case in which the officer acting in a personal transaction and so understood by the plaintiff did not purport to issue the forged certificate but to assign it as outstanding stock it will be seen that neither principle nor precedent may be invoked for its support. It is not within the second class, since he neither purported to act as agent nor acted within his apparent authority. Even assuming that he acted as agent it would be contrary to the rule in the third class since the act was outside his apparent authority, and again even assuming that he did act within his apparent authority, in conflict with the rule in the fourth class since he was not acting as agent. The court regrets its decision but deems itself bound by the case of Shaw v. Port Phillip Mining Co. (1884), 13 Q. B. D. 103. But in this case the officer purporting to act as agent issued the forged certificate instead of assigning outstanding shares in a personal transac-

tion and the case falls within the second class and is in accord with Fifth Ave. Bank v. Forty-Second St. R. R. Co., *supra*.—*Columbia Law Review*.

IMPEACHMENT OF WITNESSES BY PROOF OF SPECIFIC WRONGFUL ACTS.*

PART III.

It is unfortunate that there had been no decisive adjudication of this question, by the American courts, prior to the American revolution. Whensoever questions have arisen that are to be controlled by the common law, the repository thereof being in the English treatises and reports, the courts have necessarily turned to those sources for information. Quite a number of ill-considered and conflicting decisions or *dicta*, emanating from *nisi prius* courts, could be found. Not infrequently the same case would be reported in different ways in different reports. Whensoever one of these was found, it being the best that could be found, many of our courts, with that extreme reverence for the wisdom that has fallen from the lips, likely *in arguendo*, of Lord This or Baron That, have at once accepted such as sacred, to deny which would be on the verge of sacrilege, and have blindly followed wheresoever it might lead: and this without reference to the exact point in issue in the case cited and the one at bar. The evils of such practice is manifest in the matter now under investigation. Thus the case of People v. Herrick[70] is extensively cited as an authority that a witness is not compellable to answer a question even on cross examination an answer to which would tend to show him infamous or disgraced. The decision was correct. A witness was on his *voir dire* touching his competency. He was asked whether he had not been convicted of petit larceny and was then in confinement under such conviction. The counsel for defendant objected that the witness was not bound to answer it. The court overruled the objection and compelled an answer. The witness answered in the affirmative and was set aside as incompetent. In the course of the decision, reversing the case, the court cited ample and apt authority to the point in issue, *i. e.*, that to show incompetency the record of the conviction must, under the "best evidence" rule, be produced. But the question of the latitude allowed under cross-examination was not involved. Yet Judge Spencer, a very great judge, cited the celebrated *dictum* in Cook's case, and blindly following it, laid down the broad proposition that: "It is against a fundamental principle that a party shall accuse himself, and propagate, to the remotest period, his own infamy." This is no less a *dictum* than is that of the revered Chief Justice upon which it is based. That such is not now, at least, the fundamental principle, refer back to that paragraph of this article where it is shown that in nearly every state the conviction may be shown on cross-examination, when it only goes to the credit. This *dictum* has been relied upon, directly or indirectly, in practically every American case that holds that a witness cannot be compelled, on cross-examination, to answer questions, the answer to which would show degradation.

American Cases.—Having thus seen the confusion in the texts let us now look at some of the cases. Here we find hopeless confusion and conflict, not only between the courts of the various states, but the decisions of the same court, yes of the same judge. This is exceedingly unfortunate, for points of practice that are constantly arising ought te be settled with certainty, rightly settled is preferable, but wrongly is better than uncertainty.

New York, Missouri, and Rhode Island are, possibly, pre-eminent in this respect. In two late New York cases,—People v. Priori,[71] and People v. Webster,[72]—we find statements that seem to approve of the earlier cases of People v. Lohman,[73] and People v. Herrick.[74] In the Priori case the court says: The trial "court, in effect instructed the witness that he might decline to answer any question where the answer would tend to incriminate or degrade him." The witness was a prisoner confined to the Tombs on a charge of murder and was brought out as a witness to testify to certain conversations he had heard whilst so confined. Whilst the court of appeals approved of the action of the trial court, it is evident that the only matter considered was the privilege from self-incrimination, since the matter of mere degradation could not be involved. In the Webster case the court says: "It is now an elementary rule that a witness may be specifically interrogated, on cross-examination, in regard to any vicious or criminal act of his life, and may be compelled to answer, unless he claims his privilege. * * * When a defendant elects to become a witness, it is for all the purposes for which a witness may be lawfully examined in the case; and he is not in the constitutional sense, 'compelled to be a witness against himself,' although, when subjected to the test of a legitimate cross-examination, he may be required to make disclosures which tend to discredit or to incriminate him." In this case no claim of privilege was interposed, and the only question was whether the question was competent and relevant as to the party. In Van Bokkelein v. Berdell,[75] a witness in his own behalf was, on cross-examination, over objection,

*Continued from last week.

[70] 13 John. 82, 7 Am. Dec. 364.

[71] 164 N. Y. 459, 58 N. E. Rep. 668.

[72] 139 N. Y. 73, 34 N. E. Rep. 730.

[73] 1 N. Y. 379, 49 Am. Dec. 340.

[74] 13 John. 82, 7 Am. Dec. 364.

[75] 130 N. Y. 141, 29 N. E. Rep. 254.

compelled to answer that he had been indicted for a crime. It was held error, solely on the ground that: "While a witness may be discredited by showing his conviction for an offense, we do not understand it to be competent to discredit him by showing that he had been indicted." The substance and not the method was condemned. In Spiegel v. Hays,[76] a witness was asked if he had not been convicted, and for what. He appealed to the court as to whether he must answer, which held that he must. Here the question of privilege is directly raised. After referring to the fact that formerly a conviction must be shown by the record, by reason of the "best evidence" rule, and of the change by sec. 714, Pen. Code, by which it is provided that it, a conviction may be shown on the cross-examination of the witness, the court of appeals affirmed the case, saying: "You may now show upon the cross-examination of the witness himself that he has been convicted of a crime, or that he has been imprisoned upon a conviction of a crime, or that he has committed a crime." It is to be noted that neither of these last two come within the code provision. In People v. Irving,[77] the action of the trial court in requiring the answer to a degrading question over the objection of the party, was approved. So in People v. Noelke,[78] approved in Spiegel v. Hays, *supra*, defendant testifying for himself was asked, on cross-examination, whether since a certain date, he had been engaged in the business of selling lottery tickets and lottery policies, and whether he had not been convicted of a certain crime. The court of appeals said: "The first was a fact inquired about, not a mere accusation or charge, but the actual commission of a crime, and an affirmative answer must necessarily have tended to discredit the witness, and was proper. The second was admissible for the same reason, and also by reason of the section of the code above referred to; thus showing that as to the first the code was not relied on. See also Markgraf v. Klinge.[79] Only in Spiegel v. Hays was the privilege claimed by the witness, yet the other cases are of some little weight as showing the leanings of the court. I think New York may be classed with the states that leave the matter to the sound discretion of the trial court. In Missouri the decisions are in worse confusion. Thus, in Gesell v. State,[80] the defense, on cross-examination, asked the principal witness for the state a line of questions, the evident purpose of which, was to show the past immoral life of the witness. Upon an objection by the state they were excluded. On appeal the supreme court said, through Sherwood, J.: "There was no error committed in refusing counsel for defendant to interrogate Glazebrook in the manner attempted. This action of the court may well be made to rest on two grounds: In the first place, the credit of a witness cannot be impeached by inquiry into specific past delinquences, but only by facts which go to show what the general moral character or reputation therefor are, and what the general moral character or reputation for truth and veracity (is). In the second place, it will not be allowed in a court of justice to put a witness on the rack as to past transactions, to rake in the ashes of long-forgotten scandals, and to uncover the scars of old wounds, in order to discredit a witness or overthrow his moral character." So in State v. Houx,[81] on cross-examination, a witness was asked as to specific acts of alleged immorality commencing at a period twenty years prior thereto. Answers were not required. Whether a privilege was claimed by the witness, or objections interposed by the party is not disclosed. On appeal the court said: "A witness should not be required to give such testimony when it does not tend directly to prove some issue." The reasons assigned are substantially the same as in the Gesell case. Both cases are probably correctly decided, but the only sound reason upon which they can rest is that they were transactions of a remote date, and the trial court properly exercised its discretion in throwing a "protective oblivion" over such matters as it could well see were so remote as not to furnish aid in determining the present character of the witnesses. Had a privilege been claimed by the witnesses, then the court might have assigned the second reason with strong support in the authorities. The court might even have gone further and held that the questions would be inhibited without either a claim of privilege, or objection; on the ground that the court would not let its time be occupied, or its citizens' character besmirched by irrelevant evidence, if such it was, as to which the trial court was the best judge. On the other hand in Muller v. Hosp. Assn.,[82] the court of appeals said, and its opinion was adopted, on appeal, by the supreme court:[83] "When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge. This is the rule. But the extent of cross-examinations of this nature is somewhat in the discretion of the court, and must necessarily be so, to prevent abuse." In State v. Miller,[84] the supreme court, speaking

[76] 118 N. Y. 661, 22 N. E. Rep. 1105.
[77] 95 N. Y. 541.
[78] 94 N. Y. 137, 144.
[79] 35 Misc. 196, 71 N. Y. Supp. 590.
[80] 124 Mo. 531, 27 S. W. Rep. 1101.
[81] 109 Mo. 654, 663, 19 S. W. Rep. 35.
[82] 5 Mo. App. 390, 401.
[83] 73 Mo. 242.
[84] 100 Mo. 606, 621, 13 S. W. Rep. 832.

through the same judge that wrote the decision in the Gesell case, said: "It is otherwise, however, where the question is asked the witness for the purpose of honestly discrediting him, then the question is competent." The questions were whether he had not been in the penitentiary two or three times. In State v. Taylor,[85] the court said: "Counsel for defendant in the cross-examination of the state's witness, Miller, asked this question: 'After this thing occurred were you not arrested for stealing billiard balls from Boulander's saloon, and sent to jail?' On the objection of the prosecuting attorney, the court ruled the witness need not answer. The defendant was entitled to have the question answered. The evident purpose of the interrogation was to discredit the witness."

In State v. Pratt,[86] the court said: Under the rulings in the last two cases "it was competent to ask the witness if he had been arrested and put in jail at Kansas City for stealing a pitchfork." So in Goins v. Moberly,[87] a witness being asked on cross-examination as to immoral relations between himself and wife prior to their marriage, the court excluded the question. On appeal the supreme court said: "The court committed no abuse of its discretion in refusing to compel the witness to answer the questions propounded." Quoting the Muller case, *supra*, that "the extent of cross-examination of this nature is somewhat in the discretion of the court, and must necessarily be so." I presume that Missouri should also be classed with the states that leave the matter in the discretion of the trial court, to be reviewed only in case of manifest abuse.

In Rhode Island I find only two cases. In State v. Ellwood,[88] thecourt quotes with approval Clemens v. Conrad,[89] where Judge Cooley says: "The danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent." It holds that a defendant, a witness in his own behalf, may be asked on cross-examination and required to answer over his objection, concerning his previous record as a criminal. Of course such record was degrading, otherwise it would not have been wanted. However, we find in Kolb v. Union Ry. Co.,[90] the same judge taking a very advanced position against the power of the trial court to compel a witness to answer a degrading question. He ignored the Ellwood case, and showed a remarkable capacity for the misapplication of authority. Of the cases cited to support his views only one, State v. Carson,[91] does so. In all the others the degrading matter was sought to be shown by other witnesses. The questions asked related to the birth of an illegitimate child. It was evidently not a remote delinquency, for the child was born only three months before the suit was brought, and decided by the supreme court within about five years. The case was, however, correctly decided for the reason that bad moral character is not proper impeachment evidence in Rhode Island, as it is not in several states hence the question did not call for any evidence material for any purpose.

The Court of Criminal Appeals of Texas[92] has well expressed the view that is in harmony with the modern well-considered cases: "While it may seem harsh to compel a witness to commit perjury, or destroy his own standing before the court, it would seem absurd to place the feelings of a profligate witness in competition with the substantial rights of the parties in the case. But it is to be remembered, and all the authorities unite in the statement, that the examination must be kept within bounds by the court; that the question should only be permitted where the ends of justice clearly require it, and the inquiry relates to transactions comparatively recent, bearing directly on the present character of the witness, and is essential to a true estimation of his testimony by the jury.[93] It should be the care of the trial judge to confine the interrogatory to matters coming within the said limitations, and properly suppress all inquiry into matters not recent, or relevant to credit; otherwise, the witness box would become a source of scandal, and an offense."

In a recent case the Supreme Court of Tennessee says: "And after a careful consideration of the question, we thipk it clear, upon the authority of our own decisions in other states, and the best text-writers, that the inquiry, on cross-examination, may go to the extent of asking about any specific acts of the witness involving moral turpitude, and the witness may be compelled to answer the questions, unless the questions involve a criminal offense for which the witness may be prosecuted; and in that case the witness is permitted to judge, for the most part, for himself, and to refuse to answer wherever it would tend to subject the witness to criminal punishment or forfeiture. Here the court must see for itself, when the witness claims the privilege of not answering, that the answer will directly show his infamy or crime, before it will excuse him from testifying. If the offense inquired about is barred by the statute of limitations from crim-

[85] 118 Mo. 153, 22 S. W. Rep. 806.
[86] 121 Mo. 566, 574, 26 S. W. Rep. 556.
[87] 127 Mo. 116, 29 S. W. Rep. 985.
[88] 17 R. I. 763, 24 Atl. Rep. 782, 784.
[89] 19 Mich. 170.
[90] 23 R. I. , 49 Atl. Rep. 392, 54 L. R. A. 646.
[91] 66 Me. 116.
[92] Carroll v. State, 32 Tex. Cr. Rep. 431, 24 S. W Rep. 100, 38 Cent. L. J. 146. Many other Texas cases are to the same effect. See McCray v. State, 38 Tex. Cr. Rep. 609, 44 S. W. Rep. 170; Whitley v. State, 42 Tex. Cr. Rep. , 56 S. W. Rep. 69.
[93] Citing 1 Greenl. sec. 459; Wharton Crim. Ev. 474, 476; Taylor on Ev., secs. 1314, 1315.

inal prosecution, then the witness could not claim the privilege of not answering."[94] The courts of Kentucky,[95] North Dakota,[96] New Mexico,[97] Oklahoma,[98] and Indiana[99] are equally clear and emphatic in enunciating the doctrine that the matter is one for the discretion of the trial court, to be reviewed only in case of abuse. The right, so far as the parties are concerned, of asking the witness on cross-examination as to specific facts not relevant to the issue, but which may properly tend to affect his credit, is generally conceded even by those courts that most strenuously insist that the witness has the privilege to decline to answer degrading questions. Thus, in Georgia a witness was sworn in behalf of the defendant, and was asked, on cross-examination, if he had served a term in the penitentiary. The defendant's counsel objected to the question, but he answered voluntarily that he had. On appeal the supreme court said: "He need not have made answer, he could have declined to answer the question, and the court would have erred if it had compelled him to do so; but as he answered it voluntarily it constituted no ground of objection on the part of defendant's counsel. No witness is bound to testify to anything that will bring disgrace or infamy upon himself or his family; but if he chooses to answer questions that are asked him, he may do so, and it constitutes no legal ground of objection on the part of another person. The witness' character and reputation were in his own keeping, and not in that of the accused."[100] And so, on the other hand, the power of the trial court, in the exercise of its discretion, to inhibit the asking of any question that merely tends to degrade, humiliate, or improperly prejudice against the witness, when it does not properly affect his present credit, is freely conceded, and the exercise of the power demanded, by the courts that most earnestly uphold the power in the trial court to compel an answer when it will properly affect the present credit of the witness.[101] It is surprising that any modern court would hold to the contrary, yet we find such, of which the Gesell and Kolb cases, *supra*, are apt and striking illustrations.[102]

Notwithstanding this great diversity of opinion as to the power of the trial court it is submitted, with great confidence in the correctness thereof, that the following is deducible from the modern and most enlightened authorities as best subserving the ends of justice—the object of all trials: Whether or not an inquiry, upon cross-examination, into specific facts in the past life of the witness, for the purpose of impeaching his credit, and relevant thereto, will promote the ends of justice, is, under the circumstances of each case, a matter resting largely in the discretion of the trial court, and will not be reviewed except for manifest abuse thereof. If the court thinks that the ends of justice will be best subserved by allowing wide latitude on the cross-examination, the witness should be compelled to undergo it and to answer any question that will aid the triers of the fact in determining what credit should be given to his evidence, however unpleasant and degrading it may be to the witness. If, however, the court can see no proper impeachment purpose in propounding the questions, they should be rigorously excluded—for not only is it against the policy of the law that any man's disgrace should be mooted in court unless there is some justifiable cause therefor, but the witness himself has rights that the court should protect. It is in the discretion of the court to decline to let the question be put, or it may let the question be put but give the witness the option of answering or not, as he sees fit, or to let the question be put and requiring the witness to answer, exercising his discretion in favor of that course which seems, under the circumstances of the case, most conducive to the ends of justice. If, however, the question calling for the disclosure of disgrace is material to the questions raised by the pleadings, the court has no discretion. It must permit the question and, if necessary, compel an answer. A failure to do so is error.[103]

[94] Zanone v. State, 97 Tenn. 101, 36 S. W. Rep. 711 35 L. R. A. 556.

[95] Burdette v. Commonwealth, 93 Ky. 76, 18 S. W. Rep. 1011; Roberts v. Commonwealth, 20 S. W. Rep. 267; McCampbell v. McCampbell, 103 Ky. 745, 46 S. W. Rep. 18. But see Howard v. Commonwealth (Ky.), 61 S. W. Rep. 756, 759, where the court, through Judge Burnam, quotes with approval the old case of Sodusky v. McKee, 5 J. J. Marsh. 622, where the court held specific acts could not be thus proved. See dissenting opinion of Judge Hobson on page 762 upon this point.

[96] State v. Pancoast, 5 N. Dak. 514, 67 N. W. Rep. 1052, 35 L. R. A. 518; U. S. v. Wood, 4 Dak. 455, 33 N. W. Rep. 59; State v. O'Hara, 1 N. Dak. 30, 44 N. W. Rep. 1003; State v. Rozum, 8 N. Dak. 548, 80 N. W. Rep. 477; State v. Ekanger, 8 N. Dak. 559, 80 N. W. Rep. 482.

[97] Territory v. Chavez, 8 N. M. 528, 45 Pac. Rep. 1107; Borrego v. Territory, 8 N. M. 446, 46 Pac. Rep. 349, 358.

[98] Asher v. Territory, 7 Okla. 188, 54 Pac. Rep. 445; Hyde v. Territory, 8 Okla. 69, 56 Pac. Rep. 851.

[99] Bedgood v. State, 115 Ind. 275, 17 N. E. Rep. 621.

[100] Taylor v. State, 83 Ga. 697, 10 S. E. Rep. 442. For authorities that the privilege is personal to the witness, see *ante*, note 6, page 5.

[101] Carroll v. State, 32 Tex. Cr. Rep. 431, 24 S. W. Rep. 100, 38 Cent. L. J. 146.

[102] Whitney v. State, 154 Ind. 573, 57 N. E. Rep. 398, seems to advance the same thought, but it is in such a casual way as to be hardly a holding to that effect.

[103] "The following section of the Indian Evidence Act (1 of 1872) may, perhaps, be deserving of consideration. After authorizing, in section 147, questions as to the credit of the witness, the act proceeds as follows in section 148: 'If any such question relates to a matter not relevant to the suit or proceeding, except so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not

When a Party is a Witness.—When a party takes the stand in his own behalf he thereby subjects himself to the same rules of cross-examination as apply to any other witness, and may be asked any question on matters pertinent to the issues, or calculated to test his accuracy, veracity, or credibility (subject to the power of the trial court to limit and regulate such examination as its discretion may dictate for the furtherance of justice) as may be asked of other witnesses; he can not avail himself of the privilege of being a witness and at the same time avoid its duties and responsibilities.[104] The question most frequently arises in criminal cases where the defendant becomes a witness. In such cases the courts, with great unanimity, freely permit questions touching past derelictions if they are material to the issues involved or call for answers that will clearly detract from the credibility of the witness. The fact that the answers may tend to incriminate is no objection if they are material to the issue, since by taking the stand he waives his privilege of exemption from self-incrimination.[105] If he waives his constitutional privilege at all, he waives it all. When he takes the stand the constitution is no longer an avenue of escape or protection. This is probably all the Supreme Court of Okalahoma means when it says: "In fact, in many instances questions can be asked a defendant, on cross-examination, while testifying in his own behalf, that could not be asked any other witness."[106] The question may be asked any witness, but an answer will not be compelled from another witness, even though material to the issue, whilst it will be compelled from the defendant. The Supreme Court of North Dakota more clearly enunciates this: "When a defendant in a criminal case voluntarily takes the witness stand in his own behalf, he thereby subjects himself to the same rules of cross-examination that govern other witnesses, with the exception that his privileges are to some extent curtailed, in that he is not only required to answer any relevant question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense, when such answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case."[107] But when a defendant is asked

obliged to answer it. In exercising this discretion, the court shall have regard to the following considerations: 1. Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies. 2. Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies. 3. Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.' Order 36, rule 38, expressly gives the judge a discretion which was much wanted, and which I believe he always possessed." Note 46, to article 129, Chase's Stephen's Dig. Evidence, p. 384. This part of the Indian Evidence Act is, in the author's judgment, a well stated summary of the better American decisions.

[104] Clarke v. State, 78 Ala. 474, 87 Ala. 71, 6 So. Rep. 368; Cotton v. State, 87 Ala. 103, 6 So. Rep. 372; Rains v. State, 88 Ala. 91, 7 So. Rep. 315; McCoy v. State, 46 Ark. 141; Lee v. State, 56 Ark. 7, 19 S. W. Rep. 16; Holder v. State, 58 Ark. 478, 25 S. W. Rep. 279; People v. Sears, 119 Cal. 267, 51 Pac. Rep. 325; Clark v. Ruse, 35 Cal. 89; McKeone v. People, 6 Colo. 346; State v. Griswold, 67 Conn. 290; Squires v. State, 42 Fla. 251, 27 So. Rep. 864; Boyle v. State, 105 Ind. 469, 5 N. E. Rep. 203; Keyes v. State, 122 Ind. 527, 23 N. E. Rep. 1097; State v. Pefferle, 36 Kan. 90, 12 Pac. Rep. 406; State v. Probasco, 46 Kan. 310, 26 Pac. Rep. 749; State v. Wells, 54 Kan. 161, 37 Pac. Rep. 1005; State v. Park, 57 Kan. 431, 46 Pac. Rep. 712; State v. Greenburg, 59 Kan. 404, 53 Pac. Rep. 61; McDonald v. Commonwealth, 86 Ky. 16, 4 S. W. Rep. 689; Burdette v. Commonwealth, 93 Ky. 76, 18 S. W. Rep. 1011; State v. Alexis, 45 La. Ann. , 13 So. Rep. 394; State v. Murphy, 45 La. Ann. 13 So. Rep. 229; State v. Guy, 106 La. 8, 30 So. Rep. 268; State v. Wentworth, 65 Me. 234; State v. Carson, 66 Me. 116; State v. Witham, 72 Me. 531; Commonwealth v. Bonnor, 97 Mass. 587; Commonwealth v. Nichols, 114 Mass. 285; Commonwealth v. Tolliver, 119 Mass. 312; Commonwealth v. Smith, 163 Mass. 411, 431, 40 N. E. Rep. 189; Elliott v. State, 34 Neb. 48, 51 N. W. Rep. 315; Leo v. State, (Neb.), 89 N. W. Rep. 303; State v. Cohn, 9 Nev. 179, 189; State v. Huff, 11 Nev. 17, 27; State v. Ober, 52 N. H. 459; Borrego v. Territory, 8 N. M. 446, 46 Pac. Rep. 349, 358; Brandon v. People, 42 N. Y. 265; Connors v. People, 50 N. Y. 240; People v. Noelke, 94 N. Y. 143; People v. Irving, 95 N. Y. 541; People v. Tice, 131 N. Y. 657, 30 N. E. Rep. 494; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730; People v. Conroy, 153 N. Y. 174, 47 N. E. Rep. 258; State v. Thomas, 98 N. Car. 599, 4 S. E. Rep. 518; State v. Allen, 107 N. Car. 805, 11 S. E. Rep. 1016; State v. Pancoast, 5 N. Dak. 514, 67 N. W. Rep. 1052, 1058, 35 L. R. A. 518; State v. Rozun, 8 N. Dak. 548, 80 N. W. Rep. 477; State v. Ekanger, 8 N. Dak. 559, 80 N. W. Rep. 482; Hanoff v. State, 37 Ohio St. 178; Asher v. Territory, 7 Okla. 188, 54 Pac. Rep. 445; Hyde v. Territory, 8 Okla. 69, 56 Pac. Rep. 851; State v. Ellwood, 17 R. I. 763, 24 Atl. Rep. 782; Peck v. State, 86 Tenn. 256, 6 S. W. Rep. 389; McCray v. State, 38 Tex. Cr. Rep. 609, 44 S. W. Rep. 170; Mendez v. State, 29 Tex. App. 608, 16 S. W. Rep. 766, approved in Hamilton v. State, 60 S. W. Rep. 39; People v. Larsen, 10 Utah, 143, 37 Pac. Rep. 258; Johnson v. State, 8 Wyo. 494, 58 Pac. Rep. 761; Fitzpatrick v. United States, 178 U. S. 304, 315.

[105] State v. Witham, 72 Me. 531; Commonwealth v. Mullen, 97 Mass. 545; Commonwealth v. Nichols, 114 Mass. 285; State v. Ober, 52 N. H. 459; People v. Tice, 131 N. Y. 657, 30 N. E. Rep. 494; People v. Webster, 139 N. Y. 73, 34 N. E. Rep. 730, and some of the other cases last above cited.

[106] Asher v. Territory, 7 Okla. 188, 56 Pac. Rep. 445 quoting Clark on Crim. Proc. p. 550.

[107] State v. Pancoast, 5 N. Dak. 514, 67 N. W. Rep. 1052, 1058, 35 L. R. A. 518. And a failure or refusal to answer may be commented on as a presumption

about a collateral matter that is not relevant to the issues involved, and that can be put only as affecting his credibility, his constitutional protection from being compelled to furnish evidence against himself is as broad as is that of any other witness. This question has not been often raised. In Maine, however, it received a very clear enunciation. In passing upon the effect of the statute of 1879, which provided that: "The defendant in a criminal prosecution who testifies in his own behalf, shall not be compelled to testify on cross-examination to facts that would convict, or furnish evidence to convict him of any other crime than that of which he is on trial," the supreme court says:[108] "This does not alter the law as it stood in this state before the enactment. It merely declares the rule adopted in this state, in the case of State v. Carson,[109] where it was held that a prisoner, who testifies in his own benalf, should not be compelled upon cross-examination to disclose his guilt in any other crime or offense, the evidence of which was not necessarily involved in the proof of the offense for which he was on trial; that a defendant in a criminal prosecution could not be compelled, while a witness, to confess independent offense, merely to affect character or credibility."

And the Supreme Court of Alabama is equally clear: "As to any fact or circumstance relevant to the issue, or which sheds light upon the commission and character of the offense, though inculpatory, he waives his constitutional right to protection against being compelled to give evidence against himself. But the waiver extends no further than to all such facts and circumstances as may tend to illustrate the particular offense charged * * * within these limits, the fullest cross-examination should be allowed; but its range into inquiries respecting past transactions, separate and distinct, is prohibited by the constitutional inhibition."[110] And Kentucky decides to like effect.[111] This seems to be in accord with the constitutional provision, and the rule that: He stands just as any other witness except that he waives his protection as to matters material to the issue.

Limitation on the Rule that Defendant Stands as Any Other Witness.—Without invoking the constitutional protection against self-incrimination, which applies to all witnesses as to mere impeachment questions, there is an objection as to degrading questions put to a defendant testifying in his own behalf, that does not apply as to the ordinary witness. The common-law rule was that: A witness called and sworn, unless by mistake, may be cross-examined as to the entire case, and all his evidential knowledge drawn out, without making him your own witness, and all proper tests of credibility applied. This rule is followed in many of the states. But at an early day it was impinged upon in Pennsylvania, and shortly thereafter the Supreme Court of the United States, speaking through Judge Story, said: "A party has no right to cross-examin any witness except as to facts and circumstances connected with the matters stated in his direct examination." This rule is in force in many of the states. It has not, however, been invoked, to any considerable extent, as applicable to the point now being considered, although degrading questions are nearly always foreign to the matters stated in the direct examination. Indeed, in many of the states that most rigidly adhere to this rule, we find many cases where the witness is vigorously assailed in this way. Thus, the court which is said to have emanated it reversed a case quite recently because the trial court refused to permit the inquiries.[112] Thus, we have negative authority that the rule does not inhibit such cross-examination of the ordinary witness. Another reason showing it has no application to the ordinary witness is that it is one that can be invoked only by the party, whilst the rule against degrading questions can be invoked, if they are material to credit, only by the witness. A few of the states have incorporated a rule in their codes whereby a witness cannot be compelled to answer degrading questions, and have partly relied on it in excluding degrading questions asked of the ordinary witness. Most notable of these is California.[113] Many of the states that follow the common-law rule as well as some of those that follow the federal rule above quoted, have incorporated the federal rule in their statutes permitting persons charged with crime to testify in

against him. See State v. Witham, 72 Me. 531. When a co-defendant, the trials being severed, is called as a witness by, and testifies for the defendant, he is subject to cross-examination just as any other witness. The exemption of the statute that when a defendant testifies in his own behalf his cross-examination must be confined to the matter referred to in his examination in chief, is only allowed when a witness testifies in his own behalf, and not when he is a witness for another. State v. Kennedy, 154 Mo. 268, 55 S. W. Rep. 293.

[108] State v. Witham, 72 Me. 531, 534.

[109] 66 Me. 116.

[110] Clarke v. State, 78 Ala. 474, quoted with approval in Rains v. State, 88 Ala. 91, 7 So. Rep. 315. See also Clarke v. State, 87 Ala. 71, 6 So. Rep. 368; Cotton v. State, 87 Ala. 103, 6 So. Rep. 372. But see State v. Allen, 107 N. Car. 805, 11 S. E. Rep. 1016, where the supreme court says: "When he voluntarily does so, he waives his constitutional privilege of not being required to give evidence tending to criminate himself, and to impeach and shake his evidence he can be asked questions as to other and distinct offenses, from which any other witness who is compelled to go upon the stand will be excused from answering upon pleading his constitutional privilege." The court cites State v. Thomas, 98 N. Car. 599, 4 S. E. Rep. 518. See also People v. Tice, 131 N. Y. 557, 30 N. E. Rep. 494; People v. Conroy, 153 N. Y. 174, 45 N. E. Rep. 258, 261.

[111] Howard v. Commonwealth (Ky.), 61 S. W. Rep. 756, 758.

[112] Tla-koo-yel-lee v. U. S., 167 U. S. 274.

[113] Clark v. Reese, 35 Cal. 89; People v. Reinhart, 39 Cal. 449; Pyle v. Biercy, 122 Cal. 383, 55 Pac. Rep. 141.

their own behalf. We have seen that it does not apply to the ordinary witness, but does it apply to the defendant? In only one state, so far as I now recall, has this received answer. In Oregon the last clause of the statute is: "That such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal."[114] In a recent case the supreme court said:[115] "In State v. Abrams,[116] the language used is undoubtedly broader than is warranted by the cases of State v. Lurch,[117] and State v. Saunders,[118] which hold that a defendant in a criminal action cannot be cross-examined touching any other crimes he may have committed, unless he refers to such crimes in his direct examination, thus showing that he is not to be treated as a general witness to whom such questions may be propounded in the discretion of the trial court, for the purpose of testing his credibility.[119] The reason for this distinction is found in the fact that if the defendant could be treated as a general witness, and cross-examined as such, evidence of inculpatory acts tending to the commission of the crime with which he was charged, and also of the commission of other crimes, might be brought before the jury, thereby causing them to lose sight of the real issue to be tried, and tending to the return of a verdict of guilty based upon evidence of particular acts wholly disconnected with the case on trial, in view of which the legislative assembly has wisely limited the rule of cross-examination, and confined it to the evidence given by the accused in his examination in chief;[120] but, if he has made at other times statements which are inconsistent with the testimony given by him at his trial, he may be impeached by proof of such contradictory statements in the manner prescribed by statute, and the conclusion reached in State v. Abrams is adhered to in this respect. The condition of the defendant's memory, however while it may affect his credibility, does not tend to prejudice him in the minds of the jurors, who, as men, must know that sickness, accidents, age, and many other causes impair this faculty of the human mind; and as the statute was designed to eliminate from a criminal trial, so far as the defendant's testimony is concerned, all matters of prejudice only, the right to cross-examine him in relation to the condition of his memory is not limited or restricted."

Same Subject.—The courts recognize the fact if questions not clearly affecting credibility as a witness—but the answers called for are not creditable to him as an individual—are allowed to be put to the ordinary witness, it may not be seriously deleterious to the party who offered him, certainly such damage should not be presumed. But if such questions are put to a witness who is also the party, and he is required to answer, it is hardly to be expected that it will not prejudice the jury in such a way as to prove damaging to him; in a nicely balanced case it would probably turn the scale against him. Hence, as to particular acts of misconduct the trial court may well restrict the cross-examination of accused persons in regard to their past life within narrower limits than of the ordinary witness, and should use his discretion cautiously in order to avoid, as far as possible, the danger of this prejudice. For this reason we find, even in the absence of a statute such as that above quoted from Oregon, the New York Court of Appeals granted a reversal. A defendant, testifying for himself, was, on cross-examination, asked: "Were you also in 1869, along in February or March, arrested on a charge of bigamy?" Objection was interposed by counsel and overruled. On appeal the court said: "Although the prisoner did not claim the privilege, the question was incompetent. It did not legitimately tend to impair the credibility of the prisoner as a witness, and was not competent for any purpose. The discrimination which courts possess, to permit questions of particular acts to be put to witnesses for the purpose of impairing credibility should be exercised with great caution, when an accused person is a witness on his own trial. He goes upon the stand under a cloud; he stands charged with a criminal offense, not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence is, therefore, looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient. * * * Questions to be put to an accused person, which are irrelevant to the issue, and are calculated to prejudice him with the jury, should at least be of a character which clearly go to impeach his general good moral character, and his credibility as a witness."[121]

[114] Hill's Ann. Laws Oreg., sec. 1365.

[115] State v. Bartmess, 33 Oreg. 110, 54 Pac. Rep. 167.

[116] 11 Oreg. 169, 8 Pac. Rep. 327.

[117] 12 Oreg. 99, 6 Pac. Rep. 408.

[118] 14 Oreg. 300, 12 Pac. Rep. 441.

[119] Citing State v. Bacon, 13 Oreg. 143, 9 Pac. Rep. 393.

[120] Citing State v. Gallo, 18 Oreg. 423, 23 Pac. Rep 64.

[121] People v. Crapo, 76 N. Y. 288, quoted with approval in Hanoff v. State, 37 Ohio St. 178, 182. People v. Tice, 131 N. Y. 657, 30 N. E. Rep. 494, 496, last paragrap. See also, Elliott v. State, 34 Neb. 48, 51 N. W. Rep. 315; Leo v. State, 63 Neb. , 89 N. W. Rep. 303; People v. Wells, 100 Cal. 459, 34 Pac. Rep. 1078; People v. Phelan, 123 Cal. 521, 56 Pac. Rep. 424; People v. Cahoon, 88 Mich. 456, 50 N. W. Rep. 384; People v. Gotshall, 123 Mich. 474, 82 N. W. Rep. 274. But see, People v. Conroy, 153 N. Y. 174, 47 N. E. Rep. 258,

What Specific Acts May be Inquired of.—Since the party, the witness, or the court may object, as has been seen, to any question on cross-examination, tending to degrade, that is neither relevant to the issue nor to credit, it is necessary to notice those things that are proper to affect credit. There is a difference in the law of the various states as to what vicious characteristics may be legally relevant as to credibility. In all jurisdictions it is, of course, the truth-telling characteristic, or rather the want of it, that is in this way sought to be ascertained. In some the range of inquiry as to the acts of the witness that are relevant for this purpose is much broader than in others. This is more clearly illustrated where the general reputation is inquired into by means of third persons, than it is where the characteristic is sought to be developed by the cross examination of the witness attacked. In some states under the "general reputation" method the inquiry is confined solely to his reputation for truth and veracity; in others his general reputation for truth, veracity and morality may be inquired into. Fortunately, whether the one or the other is the rule, each state, with possibly an exception or two, has a well settled practice. In determining what questions may be asked on cross-examination for a like purpose a consideration of the policy of the state as embodied in its "general reputation" rule, whether statutory or common law, will be of great aid in reaching a proper solution. It is a logical and reasonable conclusion that in those jurisdictions where the general reputation for truth and veracity is the limit of the inquiry where third persons are called as impeaching witnesses, the inquiry to impeach him out of his own mouth should be confined to those specific acts of wrong doing that directly affect and involve a truth-telling disposition; but in those jurisdictions where the general bad reputation of the witness for morality may be shown by third persons, the inquiry may be so extended as to embrace all those specific acts of past dereliction as affect the moral character of the witness, being confined, of course, to those of such recent date as tend to show his present character.

JAMES A. YANTIS.

University of Missouri.

261; State v. Allen, 107 N. Car. 805, 11 S. E. Rep. 1016. Mr. Wigmore says at section 444b that the distinction taken in the case of Crapo, *supra*, between a defendant-witness and other witnesses, seems no longer the law of New York, and cites the Conroy case, *supra*. The language will bear out the statement, but I do not think it was the purpose in the Conroy case to at all dispute the principles laid down in the Crapo case.

CITY ORDINANCE—SMOKE NUISANCE.

MAYOR, ETC., OF JERSEY CITY v. ABERCROMBIE.

Supreme Court of New Jersey, June 13, 1904.

An ordinance of Jersey City, which provides that the owner of any premises on which an engine or locomotive is used shall not, under a penalty therein prescribed, permit any cinders, dust, gas, or smoke to escape or be discharged therefrom to the detriment or annoyance of any person not being therein or thereon engaged, is unreasonable and void, at least in so far as it affects the Pennsylvania Railroad Company, which has the legal right to use either hard or soft coal, using due care and doing no unnecessary damage.

VAN SYCKEL, J.: The *certiorari* in this case brings up a judgment of the Frst Criminal Court of Jersey City against Abercrombie for violating the following ordinance while superintendent of the Pennsylvania Railroad Company:

"An ordinance to abate all nuisances arising or resulting from the burning of soft coal or other substances and prohibiting the escape or discharge of smoke, dust, gas and cinders.

"Sec. 219. The owners, lessees, tenants, occupants and managers of every shop, manufactory and premises where any burning is done or wherein or upon any engine or locomotive is used shall not cause, suffer or allow any cinders, dust, gas, or smoke to escape or be discharged from such building or premises to the detriment or annoyance of any person not being therein or thereon engaged.

"Nor shall any owner, lessee, occupant, manager or any engineer, fireman or any other person cause, suffer, or allow any smoke to escape or be discharged from any such building or premises or any engine or locomotive used therein or thereon, as the result of the use of what is known as soft coal or any other substance."

The Pennsylvania Railroad has the legal right to run its engines with the use of either hard or soft coal, so long as reasonable care is used, and no unnecessary damage is done. A strict enforcement of the ordinance would deprive the company of the right to run trains through Jersey City. The ordinance is unreasonable, and therefore void. Jenkins v. Pennsylvania R. R., 67 N. J. Law, 331, 51 Atl. Rep. 704, 57 L. R. A. 309.

The judgment should be reversed.

NOTE.—*Smoke as a Nuisance.*—In the larger cities and towns of this country there is an increasing sentiment against what is known as the smoke nuisance, and smoke abatement societies have sprung up everywhere whose object is to enforce the laws as to nuisances as they now exist and to press upon the attention of the various legislatures various proposed enactments, similar to the one set out in the principal case, which are calculated to compel individuals or corporations accused of maintaining smoke nuisances to use smoke consuming devices or otherwise be responsible for the inconvenience caused by the nuisance which they maintain. It might be advisable, therefore, to collate the authorities on the first question—is smoke a nuisance?

We think it can be safely affirmed that smoke is a noxious gas, which will therefore bring it within the rule of Fogarty v. Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. Rep. 1052, 18 L. R. A. 756, where it was held that the use of a process in burning brick by which noxious gases are generated and wafted on adjoining premises, is such a nuisance as will support an action for damages. To same effect: Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567. Direct authority, however, that smoke is an actionable nuisance is to be found in the case of Louisville & Nashville R. R. v. Orr, 91 Ky. 109, 15 S. W. Rep. 8, where it was held that a railroad company whose track runs through a city street, is liable to the owners of adjoining property for damages thereto caused by the smok and discomfort incident to the running of its trains.

In the same manner an engine house erected so near a church that the smoke renders the occupancy thereof uncomfortable is a nuisance. Baltimore & P. R. Co. v. Baptist Church, 108 U. S. 317. To same effect as applying to residence property: Ottawa Coke Co. v. Thompson, 39 Ill. 598; Peacock v. Spitzelberger (Ky. 1895), 29 S. W. Rep. 877; Whalen v. Keith, 35 Mo. 87; McClung v. Coke Co., 9 Ohio Cir. Ct. Rep. 259; Galbraith v. Oliver (Pa.), 3 Pittsb. Rep. 78; McKinney v. McCullough (Pa.), 42 Leg. Int. 414.

Sometimes, however, the one injured by smoke nuisance destroys his right to damages or abatement by laches. Louisville Coffin Co. v. Warren, 78 Ky. 400. In this case defendants had used a factory in a city for seven years without complaint being made of the smoke issuing from its chimney, which was 200 feet from the rear of plaintiff's residence, and it did not appear that plaintiff or his family were injured in health or that the atmosphere was rendered unpleasant by the smoke, except when the wind was blowing in the direction of the house. The court held that an injunction would not lie.

A case that goes about as far as any which has come to our attention, is that of Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654. In this case it was held that a dense smoke caused by the burning of pine wood and continued for 12 hours, twice in each month, penetrating houses at a distance of from 40 to 200 feet, amounts to a legal nuisance although the inhabitants are themselves artisans, who work at trades occasioning some degree of noise and smoke.

JETSAM AND FLOTSAM.

THE AMERICAN BAR ASSOCIATION MEETING.

The Twenty-seventh Annual Meeting of the Association will be held at St. Louis, Missouri, on Monday, Tuesday and Wednesday, September 26th, 27th and 28th, 1904.

The sessions of the Association will be at 10 o'clock A. M. and 2:30 o'clock P. M. on Monday and Tuesday, and at 10 o'clock A. M. on Wednesday, at Festival Hall, in the Exposition Grounds.

The session of the Section of Legal Education will be held on Monday afternoon at 5 o'clock.

The session of the Section of Patent, Trade Mark and Copyright Law will be held on Tuesday afternoon at 5 o'clock.

On Tuesday afternoon at 5 o'clock there will be a meeting of the Association of American Law Schools.

On Tuesday evening at 8 o'clock there will be a National Conference of State Boards of Law Examiners

All of these meetings will also be held at Festival Hall.

On Wednesday, September 28th, 1904, at 2 o'clock P. M., and on Thursday and Friday following at 11 o'clock A. M. and at 3 o'clock P. M., sessions of the Universal Congress of Lawyers and Jurists will be held at Festival Hall.

The Programme of the American Bar Association is as follows:

MONDAY MORNING, 10 O'CLOCK.

Addresses of Welcome by the Presidents of the Louisiana Purchase Exposition Company, the Missouri Bar Association and the Bar Association of St. Louis.

The President's Address, by James Hagerman, of St. Louis, Missouri, communicating the most noteworthy changes in Statute Law on points of general interest, made in the several States and by Congress during the preceding year.

Nomination and Election of Members.
Election of the General Council.
Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.

MONDAY AFTERNOON, 2:30 O'CLOCK.

A paper by J. M. Dickinson, of Illinois, on "Th Alaskan Boundary Case."

Discussion upon the subject of the paper read.

TUESDAY MORNING, 10 O'CLOCK.

The Annual Address, by Honorable Amos M. Thayer, United States Circuit Judge for the Eighth Circuit, on "The Louisiana Purchase, its Influence and Development under American Rule."

Reports of Standing Committees. (See Report of 1903, page 799, giving a memorandumof subjects referred):

On Jurisprudence and Law Reform.
On Judicial Administration and Remedial Procedure.
On Legal Education and Admissions to the Bar.
On Commercial Law.
On International Law.
On Grievances.
On Obituaries.
On Law Reporting and Digesting.
On Patent, Trade Mark and Copyright Law.
On Uniform State Laws.

TUESDAY AFTERNOON, 2:30 O'CLOCK.

A paper by Benjamin F. Abbott, of Georgia, on "To what Extent will a Nation Protect its Citizen in Foreign Countries?"

Discussion upon the subject of the paper read.

Reports of Special Committees. (See Report of 1903, pages 800 and 801):

On Classification of the Law.
On Indian Legislation.
On Penal Laws and Prison Discipline.
On Federal Courts.
On Federal Code of Criminal Procedure.
On Industrial Property and International Negotiation.
On Title to Real Estate.
On Louisiana Purchase Exposition.

WEDNESDAY MORNING, 10 O'CLOCK.

Nomination of Officers.
Unfinished business.
Miscellaneous business.
Election of Officers.

The Annual Dinner will be given under the auspices of the Louisiana Purchase Exposition Company o all delegates to the Congress and all members of

and delegates to the American Bar Association, on Wednesday evening at 7:30 o'clock.

RECEPTION ROOM.

A room in Festival Hall, in the Exposition Grounds adjoining the meeting hall, will be open as a reception room for the use of the members of the association and delegates during the days of the meeting, that is, on Monday, Tuesday and Wednesday only.

By the courtesy of the United States Circuit Court of Appeals, its court room in the United States Custom House, at the corner of Eighth and Olive Streets, will be open as a reception room on Saturday, September 24th, and Sunday, September 25th. This room will be open on Saturday and Sunday only and not during the days of the meeting, when the headquarters of the association will be transferred to Festival Hall.

Members and delegates are particularly requested to register their names as soon as convenient after their arrival in the register of the association, which will be kept in the reception room in order that the list of those present may be complete.

The members of the general council will meet in the reception room at Festival Hall, on Monday morning, September 26th, at 9:30 o'clock.

The attention of the various standing committees is called to the provision of the by-laws by which such committees are required to meet every year, at such hour as their respective chairmen may appoint, on the day preceding the annual meeting, at the place where the same is to be held. The first day of this meeting being Monday, such committees are requested to comply by meeting at Festival Hall on Monday afternoon, September 26th, after the afternoon session of the association.

The attention of committees is called to the following provision of the by-laws:

"All committees may have their reports printed by the secretary before the annual meeting of the association; and any such report, containing any recommendation for action on the part of the association, shall be printed, together with a draft of bill embodying the views of the committee, whenever legislation shall be proposed. Such report shall be distributed by mail by the secretary to all the members of the association at least fifteen days before the annual meeting at which such report is proposed to be submitted. No legislation shall be recommended or approved except upon the report of a committee."

It is desirable that all nominations of new members, as far as possible, should be submitted to the general council at its first session on Monday morning. The mode of nomination will be found below, and forms will be furnished by the secretary, if desired. Any nomination put in proper form and sent to the secretary before the meeting will be submitted to the general council at its first session.

PROGRAMME OF THE SECTION OF LEGAL EDUCATION.

The session will be held on Monday afternoon, at 5 o'clock, at Festival Hall.

The address of the chairman, James Barr Ames, Dean of the Harvard Law School.

A paper by George W. Kirchwey, Dean of the Columbia Law School, on "The Education of the American Lawyer."

A discussion of the general subject of each of the foregoing papers.

PROGRAMME OF THE SECTION OF PATENT, TRADE MARK AND COPYRIGHT LAW.

The session will be held on Tuesday afternoon, at 5 o'clock, at Festival Hall.

The address of the chairman, Edmund Wetmore, of New York.

One or more additional papers will be read.

PROGRAMME OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS.

The session will be held on Tuesday afternoon, at 5 o'clock, at Festival Hall. Should the time prove inadequate, a second session will be held Tuesday evening.

Address of the president, Ernest W. Huffcut, Dean of the Cornell University College of Law, on "The Elective System in Law Schools."

A paper by Harry S. Richards, Dean of the University of Wisconsin College of Law, on "Entrance Requirements for Law Schools."

The papers will be followed by a discussion.

NATIONAL CONFERENCE OF STATE BOARDS OF LAW EXAMINERS.

A call has been issued for a National Conference of the State Boards of Law Examiners to meet at Festival Hall, on Tuesday, September 27th, 1904, at 8 o'clock P. M., in connection with the meeting of the American Bar Association, and with the endorsement of the movement by the executive committee of the American Bar Association.

The question of permanent organization will be considered, and also of providing for similar meetings annually.

An address will be made by Lucius H. Perkins, of Kansas, on "The State Board—A Landmark in Lawyer-Making."

One or more additional papers will be read.

OFFICERS OF THE ASSOCIATION.

President, James Hagerman, St. Louis, Missouri.

Secretary, John Hinkley, 215 N. Charles street Baltimore, Maryland.

Treasurer, Frederick E. Wadhams, 34 Tweddle Building, Albany, New York.

Executive Committee, President, Secretary, Treasurer, Francis Rawle, Philadelphia, Pennsylvania, *Ex officio*; P. W. Meldrim, Savannah, Georgia; Platt Rogers, Denver, Colorado; M. F. Dickinson, Boston Mass.; Theodore S. Garnett, Norfolk, Virginia; William P. Breen, Fort Wayne, Indiana.

SECTION OF LEGAL EDUCATION.

James Barr Ames, Cambridge, Mass., chairman; Charles M. Hepburn, 307 Carlisle Bldg., Cincinnati, Ohio, secretary.

SECTION OF PATENT LAW.

Edmund Wetmore, New York, N. Y., chairman Melville Church, 63 McGill Bldg., Washington D. C., secretary.

ASSOCIATION OF AMERICAN LAW SCHOOLS.

Ernest W. Huffcut, Ithaca, N. Y., president; William P. Rogers, 2[illegible] West Ninth street, Cincinnati Ohio, secretary.

JEFFERSON'S ANIMADVERSIONS ON THE DECISIONS OF CHIEF JUSTICE MARSHALL.

Marshall's opinions that of Cohen v. Virginia and Marbury v. Madison. We are indebted to the *Virginia Law Register* for an opportunity to reproduce a part of this letter as follows: You request me confidentially to examine the question whether the supreme court has advanced beyond it's constitutional

In a letter of Thomas Jefferson dated June 12, 1823, recently published to Judge William Johnson, a member of the United States Supreme Bench at that date, the writer very severely comments on two of limits, and trespassed on those of the state authorities? I do not undertake it, my dear sir, because I am unable. Age, and the wane of mind consequent on it have disqualified me from investigations so severe, and researches so laborious, and it is the less necessary in this case as having been already done by others with a logic and learning to which I could add nothing. On the decision of the case of Cohens v. The State of Virginia, in the Supreme Court of the United States in March 21, Judge Roane, under the signature of Algernon Sidney, wrote for the *Enquirer* a series of papers on the law of that case. I considered these papers maturely as they came out, and confess they appeared to me to pulverise every word which had been delivered by Judge Marshall of the extrajudicial part of his opinion; and all was extrajudicial, except the decision that the act of congress had not purported to give to the corporation of Washing the authority claimed by their lottery law of controuling the laws of the states within the states themselves, but, unable to claim that case, he could not let it go entirely, but went on gratuitously to prove that, notwithstanding the XIth amendment, of the constitution, a state could be brought, as a defendant, to the bar of this court, and, again, that congress might authorise a corporation of it's territory to exercise legislation within a state, and paramount to the laws of that state. I cite the sum and result only of his doctrines, according to the impression made on my mind, at the time, and still remaining. If not strictly accurate in circumstance, it is so in substance. This doctrine was so compleatly refuted by Roane, that if it can be answered I surrender human reason as a vain and useless faculty, given to bewilder, and not to guide us. And I mention this particular case, as one only of several, because it gave occasion to that thoro' examination of the constitutional limits between the general and state jurisdictions which you have asked for. There were two other writers in the same paper, under the signatures of Fletcher of Saltown, and Somers, who in a few essays presented some very luminous and striking views of the question. And there was a particular paper which recapitulated all the cases in which it was thought the federal court had usurped on the state jurisdictions. These essays will be found in the *Enquirers* of 21. From May 10 to July 13. It is not in my present power to send them to you; but if Ritchie can furnish them, I will procure and forward them. If they had been read in the other states, as they were here, I think they would have left, there as here, no dissentients from their doctrine. The subject was taken up by our legislature of 21-22. And two draughts of remopstrances were prepared and discussed. As well as I remember there was no difference of opinion as to the matter of right; but there was as to the expediency of a remonstrance at that time, the general mind of the states being then under extraordinary excitement by the Missouri question; and it was dropped on that consideration. But this case is not dead, it only sleepeth. The Indian chief said he did not go to war for every petty injury by himself; but put it in his pouch, and when that was full, he then made war. Thank heaven we have provided a more eaceable and rational mode of redress.

This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. I recollect another instance, and the more particularly perhaps, because it in some measure, bore on myself. Among the midnight appointments of Mr. Adams were commissions to some federal justices of the peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the department of state, on my entry into office, and I forbade their delivery. Marbury, named in one of them, applied to the supreme court for a *mandamus* to the secretary of state (Mr. Madison) to deliver the commission intended for him. The court determined, at once, that, being an original process, they had no cognizanse of it; and there the question before them was ended. But the chief justice went on to lay down what the law would be, had they jurisdiction of the case. To-wit, that they should command the delivery. The object was clearly to instruct any other court having jurisdiction, what they should do, if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could anything exceed the perversion of law? For if there is any principle of law never yet contradicted, it is that delivery is one of the essentials to the validity of a deed. Altho' signed and sealed, yet as long as it remains in the hands of the party himself, it is *in fieri* only, it is not a deed, and can be made so only by this delivery. In the hands of a third person it may be made an escrow; but whatever is in the executive offices is certainly deemed to be in the hands of the president, and in this case was actually in my hands, when I countermanded them because there was as yet no secretary of state. Yet this case of Marbury and Madison is continually cited by bench and bar, as if it were settled law, without any animadversion on it's being merely an *obiter* dissertation of the chief justice.

It may be impracticable to lay down any general formula of words which shall decide at once, and with precision in every case, the limit of jurisdiction. But there are two canons which will guide us safely in most of the cases. 1. The capital and leading object of the constitution was to leave with the states all authorities which respected their own citizens only, and to transfer to the United States those which respected citizens of foreign, or other states; to make us several as to ourselves, but one as to all others. In the latter case then constructions should lean to the general jurisdiction; if the words will bear it; and in favor the states in the former; if possible to be so construed. And indeed, between citizen and citizen of the same state, and under their own laws, I know but a single case in which a jurisdiction is given to the general government That is where anything but gold or silver is made a lawful tender or the obligation of contracts is any otherwise impaired. The separate legislatures had so often abused that power, that the citizens themselves chose to trust it to the general, rather than to their own special authorities. 2. On every question of construction, carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what

meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed. Let us try Cohen's case by these Canons only, referring always, however, for full argument, to the essays before cited.

1. It was between a citizen and his own state, and under a law of his state. It was a domestic case therefore, and not a foreign one.

2. Can it be believed that under the jealousies prevailing against the powers of the general government, at the adoption of the constitution, the state means to surrender the authority of preserving order enforcing moral duties, and restraining vice within their own territory? And this is the present case, that of Cohen being under the ancient and general law against gaming? Can any good be effected by taking from the states the moral rule of their citizens, and subordinating it to the general authority, or to one of their corporations, which may justify forcing the meaning of words, hunting after possible constructions, and hanging inference on inference, from heaven to earth, like Jacob's ladder? Such an intention was impossible, and such licentiousness of construction and inference, if exercised by both governments, as may be done with equal right, would equally authorize both to claim all powers, general and particular, and break up the foundations of the Union. Laws are made for men of ordinary understanding, and should therefore be construed by the ordinary rule of common sense. Their meaning is not to be sought for in metaphysical subleties, which may make anything mean everything or nothing, at pleasure. It should be left to the sophisms of advocates, whose trade it is to prove that a defendant is a plaintiff, altho' dragged into court *torto colo*;] that a power has been given, because it ought to have been given, *et alia talia*. The states supposed that by their 10th amendment they had secured themselves against constructive powers. They were not lessoned yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I wish for no straining of words against the general government, nor yet against the states. I believe the states can best govern our home concerns, the general government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the constitution for the limitation of both: and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market.

But the chief justice says "there must be an ultimate arbiter somewhere." True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, and at the call of congress, or of two-thirds of the states let them decide to which they meant to give an authority claimed by two of their organs, and it has been the peculiar wisdom and felicity of our constitution, to have provided this peaceable appeal where that of other nations is at once to force.

I rejoice in the example you set of *seriatim* opinions. I have heard it often noticed, and always with high approbation, some of your brethren will be encouraged to follow it occasionally; and in time it may be felt by all, as a duty, and the sound practice of the primitive court be again restored. Why should not every judge be asked his opinion, and give it from the bench, if only by yea or nay? Besides ascertaining the fact of his opinion, which the public have a right to know, in order to judge whether it be impeachable or not, it would show whether the opinions were unanimous or not, and thus settle more exactly the weight of their authority. The close of my second sheet warns me that it is time now to relieve you from this letter of unmerciful length. Indeed I wonder how I have accomplished it, with two crippled wrists, the one scarcely able to move my pen, the other to hold my paper. But I am hurried sometimes beyond the sense of pain when unbosoming myself to friends who harmonise with me in principle. You and I may differ occasionally in details of minor consequence, as no two minds, more than two faces, are the same in every feature, but our general objects are the same, to preserve the republican form and principles of our constitution, and cleave to the salutary distribution of powers which that has established.

TH. JEFFERSON.

THE TECHNICALITY.

(With Apologies to John James Ingalls.)

Saver of every boodler's skin am I
All genuses of graft I legal make;
In tones of Justice grim, I lurk; your stake
I make secure, your fixing safe; I squelch
The brash Grand Jury truculent, and fake
In any old indictment a mistake.

If hesitating, don't; if caught, why quake?
Why hie away, your dear old country shake?
Just tie to me—I never you forsake.
And all you wish doth follow in my wake:
Immunity—dead sure whate'er the case—
The dough, eclat, and legislative place.
So, bank on me; I save you from the pen,
And if you're in, I get you out again.

—*American Lawyer.*

BOOK REVIEWS.

ZUVER'S EARTHLY PILGRIMAGE OF JOHN JAY.

Very seldom, indeed, is there given place in a lawyer's office for art or artistic literature. From the many shelves which encircle the room, there looks down upon the busy practitioner those massive tomes of the law which, from a time whence the memory of man runneth not to the contrary, have been monotonously garbed in what is termed "law sheep." Nothing relieves: nothing serves to lighten the spirit of somberness and heaviness which broods over the place.

It was this deathly pallor of a lawyer's office which undoubtedly suggested to Mr. John Henry Zuver, editor of the *Lawgiver*, the extreme advisability of devising some appropriate relief. The result of Mr. Zuver's bright idea which he has already brought to such a successful issue, is a new, unique and wonderfully artistic series of the lives of our chief justices, entitled "Earthly Pilgrimages of the Chief Justices of the United States." The first volume of this series which has just reached our editor's desk is entitled "The Earthly Pilgrimage of John Jay," and to this volume we call attention at this time.

Outside the elegance and extreme richness of the mechanical execution of this work, the most prominent characteristic that betrays itself in the very opening statement of the author is the readableness and at times rampant jolliness of the style which accomplishes the astounding feat of catching and holding the reader's attention to such an extent that he is often persuaded by his inclinations, under such cir-

cumstances, to forsake his daily duties. The first subdivision opens as follows: "The ink which marked President Washington's approval of the Federal Judiciary Act of 1789, was scarcely dry when that functionary sent to the United States senate, the following names: For chief justice, John Jay; for associate justices, John Rutledge, James Wilson, William Cushing, Robert H. Harrison and John Blair. Two days later, on September 26, the entire slate was confirmed, and John Jay was assigned the page in history devoted to the first chief justice of the United States Supreme Court." The opening statement of the second subdivision, which deals with his birth and early life, is as follows: "John Jay entered this life at the city of New York, on the twelfth day of December, Anno Domini, one thousand seven hundred and forty-five. The first thing he did was to start for the grave, a direction in which he traveled throughout his earthly pilgrimage, which endured for eighty-three years, five months, and five days. Then that peaceful retreat was opened to receive him at Bedford, in York state—forty miles distant from the place of his birth—where he was delivered into its bosom from an attack of palsy, on May 17, 1829. Between the hour of his birth and the hour of his death were transacted those deeds of life which made John Jay famous—save, perhaps, the influence of heredity and the accretions of history."

But, notwithstanding the superior excellence of the text, the one overshadowing feature of this quaint series of judicial biographies is the luxuriance of the mechanical execution. It is a *de luxe* edition printed with large, antique type, initial letters heavily displayed, on extra heavy egg-shell roughed book paper, deckle-edged, with frontispiece of the "subject" on India Tint Cameo Plate, and all bound in limp Ooze Morocco, with lining of beautifully tinted silk—a thing of beauty, indeed, and a joy forever.

The publishers, to a letter of inquiry addressed to them, have advised us as follows, in regard to the purpose of this exquisite art series of law biographies: "Our purpose in getting out this set of books is to give the lawyers and the bench something 'different' than they are accustomed to in the line of art applied to their profession. It is something they can take home and place on their library table to emblemize their profession. That is why we adopted such expensive binding. Everything heretofore published for lawyers has been for the office—either in buckram or law sheep—and on a very ordinary quality of paper." The idea here conveyed certainly expresses a noble purpose. The law, as we have often maintained, is much more than a business; indeed, as a business pure and simple, it is wholly unsatisfactory. As one of the "learned" professions, however, the lawyer, in order to enjoy highest possibilities of his profession, must rise above the dust and din of litigious conflict, and sport himself more than occasionally among those choice spirits, who love the great principles of law for their own sake, and who uphold so strongly the ethics and *esprit du corps* of their profession in order that they might discourage the entrance of those who care nothing for such principles themselves—except as they serve to advance their own selfish interests—and who have no taste or inclination for that opportunity for enobling fellowships which the bar affords. Every lawyer, therefore, who takes a pride in his profession should desire most earnestly to exploit the story of its great men to his friends, and exploitation, considering the haracter and dignity of the profession, is worthy of being adorned and accompanied by all the appropriate embellishments offered by both fine and liberal arts.

The present tome contains 62 pages, and is published by the Associated Lawyers' Publishing Company, Battle Creek, Michigan.

BOOKS RECEIVED.

Cyclopedia of Law and Procedure. William Mack, Editor-in-Chief. Volume XII. New York. The The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1904. Review will follow.

HUMOR OF THE LAW.

Magistrate (to elderly witness). Your age madam?
Witness. Thirty.
Magistrate. Thirty what?
Witness. Years.
Magistrate. Thanks. I thought it might be months.

Spectator to defendant: Well, I guess the jury will find for you. The judge's charge was certainly very much in your favor. Don't you think so?
Def endan t (moodily): Oh, I knew all along that the judge's charge would be all right. It's the lawyer's charge that's worrying me.

Lord Norbury, walking to court one morning, saw a crowd on the quay, near the Four Courts. He inquired the cause, and was informed that a tailor had just been rescued from attempting suicide by drowning. "What a fool," responded the Chief Justice, "to leave his hot goose for a cold duck."

Mrs. B. sued Mr. B. for divorce on the ground of cruel and inhuman treatment such as to endanger life. After stating certain acts of defendant, the pleader continued that said acts "have tended to destroy her health, her happiness and her life, and the same have done so." Defendant demurred on the ground that it was alleged that plaintiff was dead and the action would not lie. The judge declined to sustain the demurrer, but recommended that plaintiff's attorney amend his pleading.

"New barn," and "old barn" were used in an insurance case to designate which barn actually burned The insurance company sought to prove that the "new barn" was the one burned and that the "old barn" was still intact.

The witness seemed stupid, and kept repeating the statement that the "old barn" burned.

"What do you mean now by 'old barn?' " asked the bald-headed lawyer.

"Well, squire, the barn was old, and it needed shingling about as badly as you do."

The following is a true story of how Judge Thomas A. Rucker paid his fine to Warner A. Root, a justice of the peace at Aspen, Colorado, in 1881.

At a trial in the justice court the justice imposed a fine of ten dollars against Judge Rucker for contempt

and suspended the payment till next day. After the court adjourned the justice asked Rucker and two other attorneys to play a game of poker. When the game had progressed for a few hours Rucker had won about all the money they had. The justice opened a jack-pot with a pair of queens, Rucker stayed with a pair of trays. After the draw the justice bet five dollars, Rucker raised him ten dollars. The justice not having ten dollars said he would call with the fine that Rucker owed the court which was agreed to. The justice laid down a queen full and reached for the jack-pot. Rucker said: "Hold on judge, the fine is paid, for I have four trays and I will take the pot." The justice reached for his docket and made the following entry "four trays beats a queen full, and the fine assessed against Thomas A. Rucker, Esq., is remitted. Warner A. Root, J. P."

Alexander Simpson, of the Philadelphia Bar, recently related that his first professional experience was in defending a man charged with assault and battery, before a justice of the peace. The point for the justice to decide was whether there was sufficient evidence to justify him in holding the defendant for trial.

After the evidence was all in, there being, as Mr. Simpson thought, not sufficient evidence to incriminate his client, he argued the case very thoroughly. Having demonstrated that his client was entitled to be discharged, he closed his argument, into which he had thrown all the feeling and pathos of which he was capable, by saying:

"On such testimony your honor can't hold my client."

"Can't eh?" said the justice. "I held three men terday on no evidence at all. Never say 'can't' to me, young man."

A lawyer in Lynn, Mass., appeared before the Fall River court as counsel for a woman who was injured in an accident, and by his unusual amount of medical learning was able to introduce into his argument many medical terms which impressed the jury and the court. The jury found for his client, and one of the jurors remarked afterwards: "What a powerful lot of medicine that lawyer knows. I should think he must have been studying up pretty near the whole of Lydia Pinkham's works."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

CALIFORNIA.....9, 67, 79
COLORADO.....54
FLORIDA.....2, 28, 29, 36, 47, 48, 88
GEORGIA.....25, 39, 49, 86, 93, 94, 95
IDAHO.....80, 78
INDIANA.....45, 71
KANSAS.....5, 11, 15, 35, 38, 42, 46, 59, 65, 84, 91
KENTUCKY.....83
LOUISIANA.....3, 26, 43, 53, 55, 62, 66, 73, 90
MASSACHUSETTS.....6, 21, 32, 41, 57
MISSISSIPPI, 10, 17, 19, 22, 23, 27, 37, 44, 50, 60, 70, 77, 81, 98, 99
MISSOURI.....52, 72
MONTANA.....80, 96
NEW YORK.....68
NORTH CAROLINA, 1, 12, 16, 20, 34, 51, 61, 63, 64, 69, 74, 75, 76, 87, 89, 92
OHIO.....8, 18
OREGON.....82, 97
SOUTH CAROLINA.....24
TEXAS.....31, 33, 40, 56, 58, 85
UTAH.....14
WEST VIRGINIA.....4, 7, 13

1. ACTION — Law and Equity.—Notwithstanding the abolition of the distinction between law and equity, equity will not take jurisdiction where the plaintiff has a complete and adequate remedy at law.—Wilson v. Green, N. Car., 47 S. E. Rep. 469.

2. APPEAL AND ERROR — Appeal from Interlocutory Decrees.—On appeal from interlocutory decree, those entered more than six months before entry of appeal held not reviewable.—Futch v. Adams, Fla., 36 So. Rep. 575.

3. APPEAL AND ERROR—Demand Not Embraced in Pleading Below.—A demand not embraced in the pleadings below cannot be urged on appeal.—Stephens v. Duckett, La., 36 So. Rep. 89.

4. APPEAL AND ERROR—Record on Appeal.—A demurrer, copies into the record by the clerk, no order having been entered by the court in any manner recognizing it, is not a part of the record on appeal.—Washington Nat. Building & Loan Assn. v. Westfall, W. Va., 47 S. E. Rep. 74.

5. APPEAL AND ERROR — Retention of Jurisdiction by Trial Judge.—In order that a trial judge out of office shall have jurisdiction to settle and sign a case made, such jurisdiction must be preserved by some proper order.—Granite State Fire Ins. Co. v. Harn, Kan., 76 Pac. Rep. 822.

6. APPEAL AND ERROR — Unresponsive Answers.—Where question and part of answer are proper, objection to other part of answer as irresponsive must be specially taken advantage of by motion to strike.—Cashin v. New York, N. H. & H. R. Co., Mass., 70 N. E. Rep. 930.

7. ARBITRATION AND AWARD — Vacating Award.—Mistake in judgment of arbitrators is not evidence of improper conduct, justifying the setting aside of an award.—Van Winkle v. Continental Fire Ins. Co., W. Va., 47 S. E. Rep. 82.

8. ARSON—Burning Insured Building.—Under Rev. St. § 6832, making it a crime for one to maliciously burn an insured building, held not essential that the building be the sole property of the person who burns it, or that the value of his property in it be $50.—Jones v. State, Ohio, 70 N. E. Rep. 952.

9. ASSAULT AND BATTERY — Unloaded Gun.—Pointing an unloaded gun at another, accompanied by a threat to discharge it, does not constitute an assault, nor does it constitute an assault if the gun is loaded but there is no attempt to discharge it.—People v. Sylva, Cal., 76 Pac. Rep. 814.

10. ATTACHMENT — Alias Summons.—Writ of attachment being returned improperly served, court should, on request, issue *alias*, and not dismiss, and should also, if necessary, direct issuance of *alias* summons.—Foote v. John E. Hall Commission Co., Miss., 36 So. Rep. 533.

11. BENEFIT SOCIETIES—Increase of Assessments.—Member of fraternal beneficiary association held bound by subsequently passed by-laws increasing his rate of monthly assessments.—Miller v. National Council of Knights & Ladies of Security, Kan., 76 Pac. Rep. 880.

12. BILLS AND NOTES—Facts Putting One on Inquiry.—Knowledge on the part of a *bona fide* purchaser of a note of the assignor's crookedness in business matters does not defeat the purchaser's title, or charge him with the duty of making inquiry about the note.—Setzer & Russell v. Deal, N. Car., 47 S. E. Rep. 466.

13. BROKERS—Agency Coupled with Interest.—A written proposition to employ as agent to sell land, signed by the proposer and accepted by the agent, makes a binding contract of agency.—John L. Rowen & Co. v. Hull, W. Va., 47 S. E. Rep. 92.

14. BUILDING AND LOAN ASSOCIATIONS — Payment of Loans.—Borrowing members of building and loan as-

sociations are entitled to have monthly payments of dues and premiums credited on the amount borrowed.—Hiskey v. Pacific States Savings, Loan & Building Co., Utah, 76 Pac. Rep. 20.

15. CHAMPERTY AND MAINTENANCE—As a Defense to an Action.—It is no defense to an action that it is being carried on under a champertous contract between plaintiff and his attorney.—Forbes v. Mohr, Kan., 76 Pac. Rep. 827.

16. CONFUSION OF GOODS—Mortgage of Stock.—Where one mixed the goods of another with his stock of goods, and then gave a mortgage on the entire stock, the mortgagee obtained no better title than the mortgagor had.—Lance v. Butler, N. Car., 47 S. E. Rep. 488.

17. CONFUSION OF GOODS—Replevin against Landlord.—Landlord held estopped to deny that cotton taken in replevin by trustee in deed executed by tenant was in fact raised on demised premises.—Alexander v. Zeigler, Miss., 36 So. Rep. 536.

18. CONSTITUTIONAL LAW—Collateral Inheritance Tax.—Rev. St. § 2731 1, exempting from collateral inheritance tax on devises and legacies property transmitted to or for the use of any institution in said state for purposes of purely public charity or other exclusively public purposes, when construed as inapplicable to boards, societies, and auxiliaries thereto incorporated under laws of other states, held not to violate section 2 of Bill of Rights, which provides that no special privileges or immunities shall ever be granted that may not be altered, repealed, or revoked by the General Assembly.—Humphreys v. State, Ohio, 70 N. E. Rep. 957.

19. CONSTITUTIONAL LAW—Power of Legislature.—The state legislature has all political power not withheld by the state constitution, or in conflict with the constitution of the United States.—Hinton v. Board of Suprs. of Perry County, Miss., 36 So. Rep. 565.

20. CONSTITUTIONAL LAW—Taxation.—The fourteenth amendment to the federal constitution held not violated by Laws 1903, p. 399, ch. 247, § 56 —Lacy v. Armour Packing Co., N. Car., 47 S. E. Rep. 53.

21. CONTRACTS—Advertising Agreement.—The refusal to prepare or furnish an advertisement to be inserted in a newspaper is a breach of a contract with the publishers to insert an advertisement.—D. O. Haynes & Co. v. Nye, Mass., 70 N. E. Rep. 932.

22. CONTRACTS—In Violation of Public Policy.—Contracts are not in violation of public policy unless either prohibited by the express terms or the fair implication of a statute, or condemned by some decision of the courts construing the subject-matter.—Orrell v. Bay Mfg. Co., Miss., 36 So. Rep. 561.

23. CONTRACTS — Right to Profits.—Grantor of undivided three-fourths of lot, contracting to secure outstanding fourth interest at certain sum, held not entitled to make profit on his contract.—Orr v. Buschman, Miss., 36 So. Rep. 535.

24. CONTRACTS — Want of Mutuality.—A contract with he owner of real estate to purchase it at foreclosure, and resell to the original owner at the same price, with 7 per cent. interest, is lacking mutuality.—Calvary Baptist Church v. Dart, S. Car., 47 S. E. Rep. 66.

25. CORPORATIONS — Extending Credit.—One extending credit to a corporation cannot complain of acts of mismanagement on the part of officers and agents of the corporation prior to the time when the credit was extended.—Commercial Bank of Augusta v. Warthen, Ga., 47 S. E. Rep. 536.

26. COUNTIES—Tax Collectors.—Tax collectors cannot lawfully pay or purchase claim against the parish.—Young v. Parish of East Baton Rouge, La., 36 So. Rep. 547.

27. COVENANTS—Failure of Title to Land.—A vendee, suing on his vendor's warranty, held entitled to recover what he had expended in perfecting his title and other damages, and not what he paid for the land.—Holloway v. Miller, Miss., 36 So. Rep. 531.

28. CRIMINAL TRIAL—Failure to Charge that Jury Can Recommend Mercy.—Mere failure of the court to charge that the statute authorizes a majority of the jury in capital cases to recommend to the mercy of the court held not error.—Webster v. State, Fla., 36 So. Rep. 584.

29. CRIMINAL TRIAL — Harmless Overruling of Pertinent Question.—Overruling an objection to a pertinent question to a state witness held not reversible, where the answer elicited tended to help accused.—Wilson v. State, Fla., 36 So. Rep. 580.

30. CRIMINAL TRIAL—Judge in Jury Room.—All communications between judge and jury should take place in open court, and in the presence of the parties and their counsel.—State v. Bland, Idaho, 76 Pac. Rep. 780.

31. CRIMINAL TRIAL—Selling Liquors to Minor.—On a prosecution for unlawfully selling liquor to a minor, it was not competent to permit a witness to testify that from physical appearance of a minor he would not have taken him to be a minor.—Dittforth v. State, Tex., 80 S. W. Rep. 628.

32. DAMAGES — Advertising Contract.—In an action to recover damages for breach of a contract to advertise in a newspaper, the burden is on the publisher to establish the amount of his damages.—D. O. Haynes & Co. v. Nye, Mass., 70 N. E. Rep. 932.

33. DAMAGES — Fright Causing Physical Injury.—Where plaintiff's wife was physically injured as the result of fright caused by defendant's negligence, plaintiff was entitled to recover for such injury together with medical and nursing expenses incurred.—Denison, B. & N. O. R. Co. v. Barry, Tex., 80 S. W. Rep. 634.

34. DEEDS — Grantor of Unsound Mind not Under Guardianship.—The deed of a person of unsound mind, not under guardianship, is merely voidable, and conveys title, so that no estate passes to the heirs, but merely a right to attack the deed.—Allred v. Smith, N. Car., 47 S. E. Rep. 597.

35. DIVORCE—Action for Alimony Barred —An action by wife for alimony held barred by foreign decree in action by husband against wife for divorce.—Phillips v. Phillips, Kan., 76 Pac. Rep. 842.

36. EMBEZZLEMENT—Questions for Jury.—In prosecution for embezzlement of a horse, the question whether a pledge or pawn of the horse by accused was intended held properly left to the jury.—Wilson v. State, Fla., 36 So. Rep. 580.

37. EMINENT DOMAIN—Closing Streets —The passage of an ordinance purporting to authorize the closing of an established street without compensation to abutting property owners is not within the power of a municipal corporation.—Laurel Imp. Co. v. Rowell, Miss., 35 So. Rep. 543.

38. EMINENT DOMAIN—Rights Remaining in Owner of Land.—In a statutory proceeding to condemn a right of way for a railroad, there remains in the owner the fee to the premises, with a right to take all subjacent minerals therefrom except such as are necessary for surface support. — Missouri, K. & N. W. R. Co. v. Schmuck, Kan., 76 Pac. Rep. 836.

39. EVIDENCE—Expert Opinion on Hypothetical Case.—An expert may give his opinion of a hypothetical case, though the facts may be the same as those of the case on trial.—Central of Georgia Ry. Co. v. McClifford, Ga., 47 S. E. Rep. 590.

40. EVIDENCE—Sale of Soda Fountain.—Where a written contract for sale of soda water fountain provided that buyer could not countermand his order, it was error, in an action on the contract, to admit evidence of countermand.—Harris-Hearin Fountain Co. v. Pressler, Tex., 80 S. W. Rep. 664.

41. EVIDENCE—Tenants Holding Conflicting Estates.—The conduct of tenants holding conflicting estates, of which the landlord is not cognizant, is not admissible to effect a construction of the lease of one of them.—Walker Ice Co. v. American Steel & Wire Co., Mass., 70 N. E. Rep. 937.

XUM

42. EXECUTION—Right to Redeem.—Purchaser of real estate at execution sale subject to a prior judgment lien held entitled, after obtaining a valid sheriff's deed, to redeem as owner from a subsequent sale under such prior judgment.—Porter v. Watson, Kan., 76 Pac. Rep. 841.

43. EXECUTORS AND ADMINISTRATORS—Right to Administer.—On application of widow in community for administration of the estate of her deceased husband who has died childless and intestate, opponent, alleging that decedent was his brother, must prove lawful filiation.—*In re* Nereaux's Estate, La., 36 So. Rep. 594.

44. EXEMPTIONS—Extent of Attorney's Lien.—That a claim collected by an attorney was for the wages of his client, which were exempt from seizure by third persons, held not to exempt the proceeds from the attorney's lien for services.—Halsell v. Turner, Miss., 36 So. Rep. 531.

45. FIRE INSURANCE—Evidence as to Value of Property.—In an action on a fire policy, it was proper to allow insured to testify as to the nature of the fixtures insured and their value at the time of the fire.—Phœnix Ins. Co. v. McAtee, Ind., 70 N. E. Rep. 947.

46. HOMESTEAD—Lease.—Joint consent to a lease of a homestead by husband and wife may exist, though the lease was signed by the husband alone when wife was several miles distant.—Johnson v. Samuelson, Kan., 76 Pac. Rep. 867.

47. HOMICIDE—Assault with Intent to Kill.—An indictment or information for assault with intent to commit the felony of murder in the first degree with a pistol need not charge that accused had and held the pistol in his hand.—Pyke v. State, Fla., 36 So. Rep. 577.

48. INDICTMENT AND INFORMATION—Assault with Intent to Kill.—An indictment or information charging assault with intent to commit murder in the first degree held sufficient to support a conviction for murder in second degree.—Pyke v. State, Fla., 36 So. Rep. 577.

49. INDICTMENT AND INFORMATION—Sale of Spirituous Liquors.—An indictment for the sale of spirituous, vinous and mixed liquors is not double, but charges a single offense, which may be sustained by proof of the sale of any one of the liquors named.—Kemp v. State, Ga., 47 S. E. Rep. 548.

50. INJUNCTION—Multiplicity of Suits.—Bill in equity by insurance companies to restrain separate actions by insured on separate policies, on the ground of inadequacy of remedy at law, sustained.—Tisdale v. Insurance Co. of North America, Miss., 36 So. Rep. 568.

51. INJUNCTION—Removal of Personal Property.—Injunction will not lie to prevent the removal of personal property, in the absence of allegation by the plaintiff that the defendants are insolvent.—Kistler v. Weaver, N. Car., 47 S. E. Rep. 478.

52. INTERPLEADER—Requisites Necessary to File Bill.—To maintain bill of interpleader, same thing must be claimed by hostile parties; and interpleader must have incurred no liability to either claimant personally.—Supreme Council of Legion of Honor v. Palmer, Mo., 80 S. W. Rep. 699.

53. JUDGES—Relation to Parties Litigating.—The husbands of two sisters are brothers-in law, within the meaning of the law providing for the recusation of judges.—State v. Foster, La., 36 So. Rep. 554.

54. JUDGMENT—Enjoining Enforcement.—One who seeks to enjoin the enforcement of a judgment on the ground that no jurisdiction of his person was obtained need not allege merits.—Crippen v. X. Y. Irrigating Ditch Co., Colo., 76 Pac. Rep. 794.

55. JUDGMENT—Res Judicata in Subsequent Action.—A judgment upholding the validity of a mortgage and sale thereunder held *res judicata* in a subsequent action.—Sadler v. Henderson, La., 36 So. Rep. 549.

56. LANDLORD AND TENANT—Assignment of Lease.—The assignment of a lease by a tenant without the consent of the landlord is not void, but voidable, at the option of the landlord, who may either claim or waive the forfeiture.—Scott v. Slaughter, Tex., 80 S. W. Rep. 648.

57. LANDLORD AND TENANT—Right to Take Ice from Pond.—Where tenants hold over after the term of a written lease has expired, they are in as tenants at will, with all the rights which had been annexed to the premises, including the right to take ice from an adjacent pond.—Walker Ice Co. v. American Steel & Wire Co., Mass., 70 N. E. Rep. 937.

58. LANDLORD AND TENANT—Sharing Crops.—Tenant leasing on shares held entitled to maintain an action against the landlord for conversion of the crops before the term of the lease expired.—Fagan v. Vogt, Tex., 80 S. W. Rep. 664.

59. LARCENY—Evidence.—In a prosecution for larceny, money of the kind and denomination stolen, shown to have been in the possession of defendant soon after the crime was committed, held properly admitted in evidence.—State v. Coover, Kan., 76 Pac. Rep. 845.

60. LARCENY—Possession of Stolen Property.—Charge, in prosecution for larceny of cattle, that possession of property recently stolen is a circumstance of guilt, held not cause for reversal.—Murray v. State, Miss., 36 So. Rep. 541.

61. LIFE INSURANCE—Insurable Interest.—Agreement, when application for a life policy was made, that a person having no insurable interest should pay the premiums and receive the proceeds of the policy, held void.—Hinton v. Mutual Reserve Fund Life Assn., N. Car., 47 S. E. Rep. 474.

62. LIFE INSURANCE—Suicide Clause.—A clause in a life insurance policy reading, "If I die by my own hand or act, voluntarily or involuntarily, sane or insane," is a mere ordinary suicide clause, which is not violated by an act done without suicidal intent.—Brignac v. Pacific Mut. Life Ins. Co., La., 36 So. Rep. 595.

63. MASTER AND SERVANT—Discharge from Employment.—Servant has a cause of action against one who willfully and maliciously induces his employer to discharge him, although such one makes no false representations.—Holder v. Cannon Mfg. Co., N. Car., 47 S. E. Rep. 481.

64. MASTER AND SERVANT—Duty to Furnish Safe Appliances.—A master is not bound to provide the servant with the safest and newest and best appliances, but merely such as are reasonably safe and in general use.—Womble v. Merchants' Grocery Co., N. Car., 47 S. E. Rep. 493.

65. MASTER AND SERVANT—Reliance on Care of Master.—An employee in a shale pit held entitled to rely on the warnings the pit boss was required to give.—Coffeyville Vitrified Brick & Tile Co. v. Shanks, Kan., 76 Pac. Rep. 856.

66. MASTER AND SERVANT—Risks Assumed.—Where there is a safe and unsafe way of doing a thing, and the servant knows it, or ought to know it, and chooses the unsafe, he cannot recover.—Schoultz v. Eckardt Mfg. Co., La., 36 So. Rep. 593.

67. MORTGAGES—Allegation as to Attorney's Fee in Foreclosure.—A complaint in mortgage foreclosure need not allege nonpayment by defendant of the attorney's fee, which at the the time of filing had neither been earned in full, nor fixed by the court.—Damon v. Quinn, Cal., 76 Pac. Rep. 818.

68. MORTGAGES—Extension.—Acceptance of interest in advance held not conclusive evidence of extension of time of payment of a mortgage.—New York Life Ins. Co. v. Casey, N. Y., 70 N. E. Rep. 916.

69. MORTGAGES—Judgment Leins.—Administrator and heirs of owner of homestead held proper parties to proceedings for the sale of the land under judgment.—Fidelity Bldg., Loan & Investment Assn. v. Lash, N. Car., 47 S. E. Rep. 479.

70. MORTGAGES—Substituted Trustee.—Where a written appointment of a substituted trustee in a deed of trust directed him to proceed at once to execute the trust, it became his imperative duty to at once proceed

to foreclose the deed.—Weir v. Jones, Miss., 36 So. Rep. 533.

71. NEGLIGENCE—Child Injured in Turntable.—A railroad, maintaining an unguarded and unlocked turntable on its premises, held liable to a child *non sui juris*, injured while playing thereon.—Chicago & E. R. Co. v. Fox, Ind., 70 N. E. Rep. 81.

72. NEGLIGENCE—Injury to Licensee.—One injured in walking across the grounds of a cemetery, by stepping in a hole, held a mere licensee, and not entitled to recover.—Barry v. Calvary Cemetery Assn., Mo., 80 S. W. Rep. 709.

73. NEW TRIAL—Conditions on Refusing.—Where the judge thinks that a new trial should be granted unless the amount of the verdict is reduced, he may so announce to the party in whose favor the verdict has been rendered, and afford him an opportunity to enter a remittitur.—Landry v. New Orleans Shipwright Co., La., 36 So. Rep. 548.

74. PARTNERSHIP — Mortgaging Firm Property. — A partner has no authority, without the consent of the other partners, to mortgage firm property for his own debt, irrespective of whether the mortgagee knew that the assets were partnership property.—Lance v. Butler, N. Car., 47 S. E. Rep. 488.

75. PARTNERSHIP—Surviving Partners.—A surviving partner has no power, after dissolution, to renew or indorse a firm note in the name of the firm.—National Union Bank v. Hollingsworth, N. Car., 47 S. E. Rep. 618.

76. PRINCIPAL AND AGENT—Character of Funds in Agent's Hands.—The proceeds of sales made by an agent are a trust fund in the hands of the agent, except as to his commissions for selling.—Lance v. Butler, N. Car., 47 S. E. Rep. 488.

77. PRINCIPAL AND SURETY — Contribution between Sureties.—Justice's judgment in suit on note against one surety and in favor of other is bar to suit by former against latter for contribution.—Ruff v. Montgomery, Miss., 36 So. Rep. 67.

78. PROCESS — Affidavit of Publication.—An affidavit for publication of summons should show whether defendant is a resident or a nonresident, and his last known place of residence.—Mills v. Smiley, Idaho, 76 Pac. Rep. 783.

79. PUBLIC LANDS—Application for Purchase.—Applicant to purchase public lands need not answer a contestant's complaint and show in himself a right to purchase unless such complaint shows a *prima facie* case against such right.—Polk v. Sleeper, Cal., 76 Pac. Rep. 819.

80. PUBLIC LANDS—Pre-emption.—Plaintiff in suit in equity to declare *bona fide* purchasers of contested pre-emption to be his trustees held to have no equity superior to the title of defendants.—Graham v. Great Falls Water Power & Townsite Co., Mont., 76 Pac. Rep. 808.

81. PUBLIC LANDS—Rights of Homesteader.—A contract entered into by homesteader, if not violative of the federal statutes, is validitated and rendered enforceable by estoppel, by issuance of patent which relates back to date of entry.—Orrell v. Bay Mfg. Co., Miss., 36 So. Rep. 561.

82. RECEIVERS—Cancellation of Mortgage.—Action to cancel mortgage to foreign building and loan association held maintainable without consent of court appointing a receiver of the association.—Egan v. North American Savings, Loan & Building Co., Oreg., 76 Pac Rep. 774.

83. REMOVAL OF CAUSES—Dismissal Without Prejudice.—Where an action for injuries is removed to the federal court, the plaintiff may dismiss, and renew his suit in the state court within 12 months from the accrual of his cause of action.—Nipp's Adm'x. v. Chesapeake & O. Ry. Co., Ky., 80 S. W. Rep. 796.

84. REPLEVIN—Condition of the Property Returned.—Where property has been taken in replevin, to comply with an alternative judgment for the return of the property, it must be returned in substantially the same condition, and without deterioration in value.—Fair v. Citizens' State Bank, Kan., 76 Pac. Rep. 847.

85. SALES—Validity of Contract.—Contract of sale, executed by agent on understanding that it should be approved by his principal, held not binding until submitted to the principal and approved by him.—Fred W. Wolf Co. v. Galbraith, Tex., 80 S. W. Rep. 648.

86. SCHOOL AND SCHOOL DISTRICTS—Uniformity of School System.—Whatever right towns and counties may have to establish and maintain public schools, the constitution requires that in other respects the public school system shall be as nearly uniform as practicable.—Barber v. Alexander, Ga., 47 S. E. Rep. 580.

87. SPECIFIC PERFORMANCE—Agreement on Sunday to Convey Land.—A contract for the conveyance of land, entered into on Sunday, is not invalid as against public policy.—Rodman v. Robinson, N. Car., 47 S. E. Rep. 19.

88. STATUTES—Construction.—Where proviso to statute follows and restricts an enacting clause, general in its scope and language, it must be strictly construed.—Futch v. Adams, Fla., 36 So. Rep. 575.

89. TAXATION — Interest.—Where the taxes, interest, and costs for which land was sold were paid by the tax debtor during the year allowed for redemption, the tax deed, valid on its face, constituted a cloud on the title.—Beck v. Meroney, N. Car., 47 S. E. Rep. 613.

90. TAXATION—Property Subject.—Assessors are statute officers, and their authority to assess property of particular kind must have been conferred upon them by law.—State v. Board of Assessors, La., 36 So. Rep. 91.

91. TAXATION—Tax Deed.—Where a tax deed was voidable for certain defects, tender of the sum actually due held not necesaary to the maintenance of an action to set aside the deed.—Shinkle v. Meed, Kan., 76 Pac. Rep. 887.

92. TELEGRAPHS AND TELEPHONES—Failure to Deliver Message.—Proof that a telegraph company received a message, and failed to deliver it to the sendee within a reasonable time, makes a *prima facie* case of negligence.—Cogdell v. Western Tel. Co., N. Car., 47 S. E. Rep. 490.

93. TRESPASS—Demurrer.—A petition in an action to restrain trespasses held not demurrable on the ground that it did not show that the land on which the trespass was about to be committed belonged to plaintiff.—Prey v. Oemler, Ga., 47 S. E. Rep. 546.

94. TRIAL—Failure of Court to Notice Impropriety.—The failure of the court to interfere of its own motion in case of impropriety in its presence will not generally be a sufficient reason to set aside a verdict at the instance of a party, when no objection to the impropriety was made pending the trial, and no ruling in reference thereto was invoked from the court.—O'Dell v. State, Ga., 47 S. E. Rep. 577.

95. TRIAL—Petition.—There is no provision of law for the service upon defendant of amendments filed to plaintiff's petition.—Miller v. Georgia R. Bank, Ga., 47 S. E. Rep. 525.

96. USE AND OCCUPATION—Proof of Ownership.—Mere proof of ownership of an interest in a placer mining claim is insufficient to show an ownership of the right to use the water adjacent thereto.—Leggat v. Carroll, Mont., 76 Pac. Rep. 805.

97. USURY—Estoppel to Plead.—Widow of borrower at usurious rate held not estopped to plead usury as to payments made by husband.—Egan v. North American Savings, Loan & Building Co., Oreg., 76 Pac. Rep. 774.

98. VENDOR AND PURCHASER—Failure of Title.—A vendee, who finds that title to the land is in the United States, need not await an eviction, but may sue at once for the recovery of the purchase money.—Holloway v. Miller, Miss., 36 So. Rep. 531.

99. WILLS—Holographic Will.—A testamentary instrument, written in the handwriting of the testatrix, except the two words, "My Will," as a caption thereto, is valid as holographic will.—Baker v. Brown, Miss., 36 So Rep. 539.